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FEDERAL TRADE COMMISSION

ADVISORY COMMITTEE ON
ONLINE ACCESS AND SECURITY

8:00 A.M.

FRIDAY, APRIL 28, 2000

VOLUME 4

FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
ROOM 432
WASHINGTON, D.C.

REPORTED BY: SUSANNE Q. TATE AND DEBRA MAHEUX

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1 P R O C E E D I N G S

2 - - - - -

3 MR. MEDINE: Good morning. Okay, thank you.

4 Thank you all for all of your diligent efforts,
5 and welcome to what I believe will be the last meeting
6 of the advisory committee. I guess we'll know that at
7 the end of the day, but I think we've made substantial
8 progress and it is our hope to wrap up as much as we
9 can today.

10 Let me first call the roll.

11 James Allen?

12 MR. ALLEN: Here.

13 MR. MEDINE: Stewart Baker?

14 MR. BAKER: Here.

15 MR. MEDINE: Christopher Curtin?

16 MR. CURTIN: Here.

17 MR. MEDINE: Paula Bruening?

18 MS. BRUENING: Here.

19 MR. MEDINE: Steve Casey?

20 MR. CASEY: Here.

21 MR. MEDINE: Fred Cate?

22 MR. CATE: Here.

23 MR. MEDINE: Jerry Cerasale?

24 MR. CERASALE: Here.

25 MR. MEDINE: Steve Cole will be late.

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1 Lorrie Cranor?
2 DR. CRANOR: Here.
3 MR. MEDINE: Mary Culnan?
4 DR. CULNAN: Here.
5 MR. MEDINE: Tatiana Gau?
6 MS. GAU: Here.
7 MR. MEDINE: Alexander Gavis?
8 MR. GAVIS: Here.
9 MR. MEDINE: Daniel Geer?
10 DR. GEER: Here.
11 MR. MEDINE: Rob Goldman?
12 MR. GOLDMAN: Here.
13 MR. MEDINE: David Hoffman?
14 MR. DAVID HOFFMAN: Here.
15 MR. MEDINE: Lance Hoffman?
16 DR. LANCE HOFFMAN: Here.
17 MR. MEDINE: Josh Isay?
18 MR. ISAY: Here.
19 MR. MEDINE: Dan Jaye?
20 MR. JAYE: Here.
21 MR. MEDINE: John Kamp?
22 MR. KAMP: Here.
23 MR. MEDINE: Rick Lane?
24 MR. LANE: Here.
25 MR. MEDINE: James Maxson?

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1 Greg Miller?
2 MR. MILLER: Here.
3 MR. MEDINE: Deirdre Mulligan?
4 MS. MULLIGAN: Here.
5 MR. MEDINE: Deborah Pierce?
6 MS. PIERCE: Here.
7 MR. MEDINE: Ron Plessler?
8 MR. PLESSER: Here.
9 MR. MEDINE: Larry Ponemon?
10 MR. PONEMON: Here.
11 MR. MEDINE: Richard Purcell?
12 MR. PURCELL: Here.
13 MR. MEDINE: Peter Reid?
14 MR. REID: Here.
15 Art Sackler will be late.
16 Dan Schutzer?
17 MR. SCHUTZER: Here.
18 MR. MEDINE: Andrew Shen?
19 MR. SHEN: Here.
20 MR. MEDINE: Richard Smith?
21 Jonathan Smith?
22 Jane Swift?
23 MS. SWIFT: Here.
24 MR. MEDINE: Jim Tierney?
25 MR. TIERNEY: Here.

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1 MR. MEDINE: Frank Torres?

2 MR. TORRES: Here.

3 MR. MEDINE: Tom Wadlow?

4 MR. WADLOW: Here.

5 MR. MEDINE: Ted Wham?

6 MR. WHAM: Here.

7 MR. MEDINE: Rebecca Whitener?

8 MS. WHITENER: Here.

9 MR. MEDINE: Thank you. I believe we have a
10 quorum.

11 First I want to thank Rick Lane and the Chamber
12 for providing refreshments. The FTC was left out of
13 the loop on that, but we appreciate your efforts.

14 MR. LANE: I just want to say I was on the West
15 Coast all last week, and I came in yesterday, and for
16 all of you who have been doing that each time, I really
17 don't envy you at all.

18 MR. MEDINE: Again, we appreciate the pleasant
19 surprise of seeing some refreshments this morning, and
20 thank you again.

21 In terms of public comments, we've continued to
22 receive comments from members of the public, and as of
23 yesterday afternoon, we had received 26 comments to the
24 committee. They are all posted on the committee's web
25 page at www.ftc.gov/acoas. The public comment period

1 for the advisory committee ends today at 5:00 p.m.
2 eastern time, and so as we work towards finalizing the
3 report, we would encourage you all to continue to check
4 the page certainly through the end of today and
5 consider any public comments that are submitted to the
6 committee.

7 As you know, the final report of the committee
8 is due on May 15th, and I think we're on excellent
9 track to meet that deadline. We will -- I'd like to
10 take up procedurally in a few moments how we'll go
11 about coming to closure on the report. I know we have
12 a drafting committee that had volunteered at the last
13 session, Deirdre, Richard Purcell, Ron Plessner, Greg
14 Miller, Paula Bruening. I think one of the goals
15 obviously is to do some final edits on the report,
16 avoid some inevitable overlap that occurs from merging
17 some of the sections, and work on font and format and
18 so forth, just to have a report that looks good as well
19 as has good substance.

20 If you are submitting individual statements,
21 which again, based on our last session, everyone is
22 free if they wish to include a separate statement which
23 will be attached to the report and delivered to the
24 Commission, you are certainly free to do so. We ask
25 that you provide us a PDF version of your individual

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1 statement, or alternatively, send us a hard copy
2 overnight to Allison Brown, who's back there, to her
3 attention for receipt by no later than May 15th,
4 ideally much sooner than that, for processing and
5 inclusion in the final report. The FTC will be
6 responsible for publishing the final report, but
7 obviously we need to get your statements and the report
8 itself as soon as possible.

9 In terms of our anticipated work schedule, we
10 anticipate taking a vote at the end of today on
11 approving the report in principle. I think it's fair
12 to say that there's some tidying up, at least, that
13 needs to be done and potentially more substantive work
14 on the report, and so as we mentioned at the last
15 session, we're proposing -- and I assume the
16 committee's decision -- is that an e-mail vote be taken
17 to finalize the report, not have the necessity of
18 another meeting, but review the report in electronic
19 circulation.

20 So, the proposed schedule that we are
21 recommending, and I think it derived in large part from
22 the discussion last time, is as follows, and I suppose we
23 will be revisiting this at the end of the day to see
24 where we are, but at least as of now, we're proposing
25 that by close of business May 3rd, at 5:00 eastern

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1 time, is the deadline for the subgroups to submit their
2 revisions to Deirdre. May 5th at noon, Deirdre will
3 e-mail the document to the -- the compiled and edited
4 document to the advisory committee mailbox, which will
5 then be distributed to all the committee members, and a
6 vote will be called for. May 10th at 5:00 p.m. will be
7 the deadline for voting by e-mail on the final report,
8 and again, that will give us time to put the report
9 together and deliver it to the Commission on time by
10 May 15th.

11 Before we start the session, Jodie Bernstein and
12 I wanted -- felt that while we were getting your
13 report, we wanted you to have something to take back
14 from us, and so we would like to distribute a little
15 something from us to you. A momento of your service
16 here (showing a T-shirt). We will be distributing --
17 you don't have to wear them during the session,
18 although you're free to do so. Jodie will be joining us
19 later in the day.

20 MR. PLESSER: We can't give you gifts, but you
21 can give us gifts?

22 MR. MEDINE: Unfortunately, that's one of the
23 ethical rules.

24 I thought while we had planned on probably
25 delving into the substance of each of the subgroups'

1 sections, based on the e-mail traffic, particularly
2 yesterday, I guess I would suggest that we jump into
3 the issue right up front of both questions that were
4 raised about how the committee's report will be used
5 and what its purpose is and so forth and the question
6 of any kind of summary or executive summary or
7 introductory statement that might be included.

8 Is that -- is the group amenable to that?

9 Let me start off by just reiterating I
10 guess what we've said all along, which is that the
11 purpose of this committee is to advise the Federal
12 Trade Commission on the issues of access and security,
13 and its particular and most immediate application is to
14 assist the Commission in evaluating the results of its
15 survey, 2000 of U.S. commercial websites'
16 privacy practices, as part of the process, which has
17 become an annual process of assessing the progress of
18 self-regulation.

19 I think the committee's deliberations to date
20 have been extraordinarily helpful in that regard, and
21 I'm sure the final report will be, as well, but that is
22 the most direct and continuing purpose of the
23 committee's work product. Obviously the Commission
24 will be making recommendations based on what it learns
25 from its survey, and I'm sure whatever debate that

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1 ensues from that in either direction will be informed
2 by the work of the committee.

3 I'm not sure the committee can really restrict
4 the use of the report, although I do understand that
5 the committee may want to reflect what it -- that at
6 least its intention is not to suggest one course of
7 action, whether it be self-regulation or legislation,
8 but that the committee -- different committee members
9 come at the issues differently, but I think -- and I
10 think this was part of the discussion yesterday on
11 e-mail -- is that clearly people would want the public
12 to benefit from its thinking regardless of where things
13 go but not to infer from the report or people's
14 participation on the committee that they support a
15 particular course of action, because my sense is that
16 some people would support continued self-regulation,
17 some would support legislation.

18 Again, the most relevant and direct use
19 of this report is to assess self-regulation, and
20 obviously people will use the report as they wish in
21 the future, but I think the key thing is not to infer
22 by your participation in it that you endorse one course
23 of action or the other but that you are informing the
24 Commission's views on legislation or self-regulation.

25 I don't know if people want to discuss that

1 particular issue first. That's at least the staff's
2 view here of the purpose of this committee, and I
3 think it's been a pretty consistent one.

4 Ron Plessner?

5 MR. PLESSER: Well, we -- a number of us had
6 gotten together to take a shot at this preface that we
7 circulated around so that we could get a lot of input
8 from other people. The -- and I think you really put
9 your -- I don't -- you know, I think you said it better
10 than I would say it. I think there is a concern, many
11 of us are in this political debate, and not just in
12 this room, but in the city and in the states around the
13 country, and I think it's very important to make it
14 clear at the beginning of the report at least what the
15 work of this committee is so that, you know, when we --
16 I or anybody else goes up to the Hill, they say, Well,
17 you signed -- your name is on this report that called
18 for this or suggested this or suggested that. So, I
19 thought it was important to do a positioning in the
20 front of the report.

21 I don't know how we want to discuss it. I've
22 circulated today some edits. Lance gave some very
23 helpful comments. The last sentence I think he poked
24 some fun at, and maybe that was right. So, we have
25 done some editing on it. I know that Deirdre and

1 others have done some more of this. There's two shaded
2 paragraphs or the two paragraphs that more get into the
3 summary or the substance -- and I think that's a very
4 important discussion, whether or not this preface
5 should have some kind of substantive summary.

6 Those two paragraphs, substantively we included
7 them, I did not do a lot of editing on it or any
8 editing on it, because I know there's others that have
9 very strong views about it. I think it can benefit
10 from -- I think the report can benefit from a
11 substantive statement in the beginning, but I think as
12 we may immediately find out, that's contentious. So, I
13 think we need to decide how to do it, but I would like
14 at least not to have the conversation totally clouded
15 over.

16 I think that there is a use for a positioning
17 statement in the beginning. Perhaps some of the
18 substantive summary can go into the chapters or some
19 other way. So, I think both things are very important,
20 but I don't want one to essentially impact the other.

21 Thank you.

22 MR. MEDINE: Okay.

23 Other comments?

24 Go ahead.

25 MR. TORRES: Frank Torres from Consumers Union.

1 I was a bit perplexed and surprised when I got this
2 document just yesterday, and after contacting some of
3 my consumer colleagues, none of the consumer groups
4 were asked to be involved in the initial drafting of
5 it, and kind of all along I had been pleasantly
6 surprised about the level of cooperation and kind of
7 consensus building that the base text document had.
8 Certainly anybody who wanted to participate had the
9 opportunity to in the development of the substance --
10 the substantive document, and then to kind of have this
11 document thrown into our lap, we weren't sure who
12 exactly was responsible for drafting it and written in
13 such a way that there are very clearly objectionable
14 things.

15 Now, granted, Deirdre and others were able to
16 quickly circulate some suggested changes, but to me
17 this whole idea of putting this type of summary in
18 front of the document kind of flew in the face of the
19 spirit of cooperation that I thought that we had tried
20 to at least foster here. So, a couple of questions.

21 One, who was doing the initial drafting of
22 this? I'd be curious to find out. And second, I did
23 note that yesterday Andrew Shen sent around a
24 suggestion, and I have no problem with a document
25 describing the process that we went through provided

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1 that all of us feel comfortable in signing onto that,
2 but as Andrew suggested, perhaps it's more appropriate
3 to be put in the form of a transmittal letter rather
4 than something that is, you know -- because to me, the
5 summary of the document should be just that, a summary
6 of a document, not, "Congress, don't use this at all
7 for any legislative purpose whatsoever."

8 First of all, it's silly to think that they
9 would not take a look at this document and use it for
10 whatever purpose they want to use it for, but to make
11 just general statements like that just doesn't make sense
12 to me.

13 MR. MEDINE: Deirdre?

14 MS. MULLIGAN: I certainly share some of
15 Frank's concerns, that I have appreciated the
16 representative nature of the various task forces that
17 we have put together, and I still am actually not
18 certain who did the drafting, and I would very much
19 like to know that. I certainly know that Ron was
20 involved, but I am interested in knowing.

21 I was particularly interested because at the
22 last meeting I think we strategically decided that it
23 was going to be very hard to summarize a document the
24 contents of which were as yet uncertain, and, in fact,
25 I think that the procedural statements about what the

1 committee was to do are absolutely fine. The summary
2 of people's feelings, of the split among the committee,
3 I think is quite problematic, because as of yet I'm
4 uncertain about what the committee is going to decide
5 and what the splits actually are.

6 So, I think that for the most part the
7 projections about what, you know, how different
8 committee members feel, I'd really like to hear those
9 expressed around this table and recorded and
10 transcribed, and when we have a document, I feel very
11 confident that we can actually summarize its contents,
12 but I think that as we decided at the last meeting,
13 that that's a more appropriate place to start.

14 MR. MEDINE: One thing I'm hearing that
15 I'll just say for a response is we have appointed -- we
16 are going to be appointing a small group to finalize
17 the document with hopefully a somewhat representative
18 group, and perhaps that group could be charged with
19 preparing the summary and having essentially a broad
20 representation on that group, to take essentially the
21 document as it exists now, in light of whatever
22 discussion occurs today, and prepare a summary for
23 distribution, but I'll take reactions to that.

24 Lance?

25 DR. LANCE HOFFMAN: David, I think that's a

1 very good idea and follow-on, and I will not move it at
2 this time, but I would suggest at an appropriate time,
3 probably this morning, we determine how a
4 representative group is going to be appointed. I would
5 just put something on the table, I'd suggest maybe two
6 people from each of the four groups get together, maybe
7 have a somewhat longer break than usual, and the groups
8 could caucus for five or ten minutes and appoint two
9 people to serve as the writers, which would I hope
10 yield a somewhat better result than this other method.

11 MS. SWIFT: Jane Swift.

12 I think there are three things sort of to move
13 the process forward that we have to decide in this
14 discussion. The first is whether or not the group
15 believes we need a summary, and if, in fact, we have
16 consensus that we need a summary, how we should
17 consider the -- what is now being discussed as a
18 summary and its dissemination, and perhaps if we could
19 consider those rough drafts rather than a part of the
20 report that was circulated fairly widely and that was
21 viewed as consensus.

22 And then lastly, if we agree we need a summary,
23 if we agree we have initial drafts, what then -- maybe
24 we should have a discussion not just procedurally on
25 how you produce that but what we think the content of

1 that should be, because I will tell you in our
2 subcommittee on access, subcommittee one, we avoided
3 any discussion of enforcement, because we knew that was
4 where the biggest divisions would come, but that is not
5 to say that different members of the group would not
6 have a different level of comfort with every different
7 proposal that was put forward, depending on who was the
8 enforcing power.

9 So, I think it is naive to ignore that that is
10 an issue. I think it probably is appropriate to put it
11 into a summary, but I think what we need to decide is
12 how we will, in fact, generate that summary, and I
13 think Dr. Hoffman's idea of how to do that is a good
14 starting point.

15 MR. MEDINE: Stewart?

16 MR. BAKER: Yeah, Stewart Baker, a couple of
17 thoughts.

18 It seems to me that we might be able to agree
19 on something like the text that has been circulated and
20 marked up to the extent that it's dealing not with
21 trying to summarize the options and where the group
22 comes out but with the point that Ron has raised, which
23 is are we endorsing legislative action here, are we
24 suggesting legislative action. I think it's clear from
25 our charter that that's not what our job is, and there

1 are obviously people who would hate to have it
2 suggested that they were laying the groundwork for
3 legislative action, and with the exception of the
4 paragraphs that were marked, I think we're probably
5 pretty close to -- to that.

6 So, my guess is we -- if we put those
7 paragraphs aside, we could probably come up with a text
8 fairly quickly, have people identify the parts that
9 they disagree with and try to find a draft.

10 On the question of summarizing where the group
11 is, which is what the paragraphs that have sparked the
12 most debate try to do, I think we're going to find if
13 you appoint eight people to do the drafting, it's going
14 to take forever, and this is the sort of thing, you
15 know, where summarizing this is a matter of great
16 nuance, and there will be endless debates about whether
17 many or most people supported this, whether some or a
18 few supported it, and so my guess is we may find it's
19 too hard and maybe not worthwhile.

20 I'm pretty much persuaded now that we may not
21 be -- want to try to do that, because that means voting
22 on every option and a lot of other stuff that will keep
23 us here longer than we should be. So, my suggestion
24 would be that we talk about the document or documents
25 in front of us without talking about the controversial

1 paragraphs that Ron has bracketed in his draft and see
2 if we think that that's close, and then separately
3 consider the question whether we want to summarize it.

4 Maybe we come back to that later in the day,
5 whether we want to try to summarize this or not.

6 MR. MEDINE: Yes?

7 DR. GEER: Just a small -- I guess maybe it's a
8 procedural question. In my life in the commercial
9 sector, most of the people that I need concurrence of
10 the most will read one page at the most. Are we in
11 that situation here? Do we have to have -- when this
12 gets read, are there a large number of people who will
13 read the front page and nothing else?

14 THE COMMITTEE: Yes.

15 DR. GEER: In which case that's all that
16 matters.

17 MS. MULLIGAN: Two pages is the rule.

18 MR. MEDINE: Let me say that I can't speak for
19 the outside world, but for the inside world I can
20 assure you that a lot more will be read internally. In
21 fact, a lot of people have been reading transcripts of
22 these meetings and your drafts and so forth. So, I
23 think you will get a pretty detailed read inside, but I
24 don't dispute the point that many people read executive
25 summaries and nothing more of reports.

1 But in terms of the Commission benefitting from
2 your thinking, the Commission has already benefitted
3 substantially from your thinking and the discussions to
4 date, and I suspect that the report will get a close
5 read inside. I obviously can't -- this has a broader
6 audience than that.

7 DR. GEER: So, we would be writing the
8 executive summary, if that's what it is, not for you
9 but for the others who read this.

10 MR. MEDINE: I think that's a fair statement.
11 I think the Commission understands clearly based on
12 your charter what your goals are and that there's no
13 representation that you either support or don't support
14 at legislation or self-regulation, but we're looking at
15 the substance of your fleshing out the subjects of
16 access and security. So, I don't think we will have a
17 problem communicating your message internally, but
18 again, obviously this will be a public document, and a
19 lot of people will have a chance to look at it.

20 Jerry and then Lorrie?

21 MR. CERASALE: In an earlier life, working for
22 a regulatory commission that wrote, oh, 500-page
23 decisions on a \$60-plus billion a year rate case, the
24 executive summary took longer than writing the rest of
25 the report, and I think that, agreeing with Stewart,

1 doing a summary of this report is clearly going to make
2 this not be the last meeting.

3 MR. MEDINE: Lorrie?

4 DR. CRANOR: I would actually like to disagree
5 a little bit with that. I think it depends on what you
6 see as sort of the scope of the executive summary, and
7 if you want the executive summary to say whether some
8 or many or few people agreed on each point, yeah, that
9 will take a long time, but if you just want to
10 summarize the options and sort of the spectrum of
11 options that are laid out in the report, which I think
12 would be a useful thing to do, I think that's a lot
13 less controversial and something which would be doable
14 by a subcommittee that we would appoint.

15 MR. MEDINE: Dan?

16 DR. SCHUTZER: I agree with Lorrie. I think
17 it's important to have an executive summary that states
18 coherently a true summary of the report. That said, I
19 agree we should take pains not to get into something
20 contentious or difficult, like most, many, few, words
21 like that, but clearly a good report needs an executive
22 summary.

23 MR. MEDINE: Ted?

24 MR. WHAM: Ted Wham.

25 I think that an executive summary is most

1 appropriate where you have a document with a lot of
2 content in it where you are trying to move an audience
3 or state a consensus or a point of view from that. So,
4 for instance, in the rate case that Jerry brought
5 forth, I presume that at the end of that document,
6 there were some decisions that were made about how that
7 rate case was going to be employed, and 500 pages were
8 to talk about all the reasons why that decision was
9 reached.

10 This is a group which was never intended to
11 come up with consensus opinion, and I think that having
12 a summary is simply going to say you can not regulate,
13 you can regulate a little bit, or you can regulate
14 lot, and I don't see that that's going to offer
15 a lot of value. I would be one of the people
16 that would say that the cover letter which was drafted
17 so far, which is effectively saying that there is a
18 broad spectrum of opinions represented in the group and
19 there is not an attempt within the document to say that
20 this is an opinion that all of us would embrace, I
21 would suggest is the best way to go forward, is the
22 most appropriate way to proceed at this time.

23 MR. MEDINE: Thank you.

24 Frank?

25 MR. TORRES: On the one hand we have got the

1 charter that's clear on what the scope of this
2 committee was all about, and to the extent that it
3 isn't about necessarily saying the Commission needs to
4 regulate this or Congress needs to legislate that, why
5 even get into that discussion one way or the other?
6 Why not just have the executive summary, as Lorrie
7 suggested, stay out of the discussion about -- some
8 people agreed to this and other people agreed to that,
9 that type of discussion, and just lay out the options
10 and say these are the options that the committee came
11 up with? And if we can't do that, then no summary
12 whatsoever.

13 It's interesting, you know, if coming up with a
14 summary is so complicated and will be so controversial,
15 then why do we have a summary document in front of us
16 that was put together by, you know, who knows who? So
17 if the charter is clear, then to the extent that
18 Ron or others have problems up on the Hill, I trust
19 their ability as lobbyists in this town, and they
20 have certainly been around long enough, I'm sure
21 they will have no problem explaining to whomever
22 they're talking to up on the Hill that the charter of
23 this commission was very specific in saying we weren't
24 saying that anything had to be legislated.

25 So, you know, if we can't come up with a clear

1 executive summary of what the options are, then I
2 submit that we do no summary.

3 MR. MEDINE: Richard?

4 MR. PURCELL: I have this kind of -- Richard
5 Purcell, sorry.

6 I have this personal feeling that we're so far
7 out of phase right now that we're not getting anywhere.
8 We're spinning our wheels.

9 Generally when you have the draft materials for
10 a report, it is not the moment to write the summary.
11 Write the darn report, and then once the report is
12 constructed, a summary can be made. If we continue
13 discussing and arguing about what the contents of a
14 summary is and then we spend the rest of the day
15 finalizing the report frameworks, we are going to have
16 to go back and re-examine what that summary agreement
17 was because it will have changed by then.

18 Personally, I'd like to formally move that we
19 set the summary documents and discussion aside for the
20 moment and get on with the work of the day, which is to
21 finalize the framework and the content of our report.
22 We can revisit the summary, perhaps we ought to
23 reserve time in the afternoon, because I personally
24 believe that a summary is very useful, but I think that
25 that will -- our purpose will be best served if we

1 follow the proper sequence.

2 MR. MEDINE: Ron?

3 MR. PLESSER: Ron Plessler.

4 I have no problem at all with Richard's
5 recommendation. I just would like one clarification.
6 I think there is a difference between a preface and a
7 summary, and I think what I and others drafted was
8 really as a suggestion. There was no -- we did try to
9 get it out in advance so everybody could see it and
10 comment on it, but it was really a preface, not a
11 summary, and I think that, you know, except for the two
12 paragraphs that I think Stewart discussed, the two
13 paragraphs, perhaps those are more summary-type things
14 and could be considered separately, but I do think it's
15 important.

16 I'm happy to put the conversation off, Richard,
17 but I think there's a difference between an executive
18 summary and a preface, and this is really I think the
19 -- the preface remains important, and I don't think it
20 does change in terms of what the substance of the
21 report is. Whether or not, you know, we attach it as a
22 transmittal letter that's attached to the report or
23 it's called a preface or whatever it seems to me really
24 secondary. I think what -- you know, and I think
25 there's a lot of flexibility in how best to do it, but

1 I think as you had said in the beginning, I think it is
2 important that -- at least to restate the context in
3 which we're doing this.

4 And so I'm happy to -- Richard, to put it off,
5 but I think it needs to be discussed today, and I think
6 we need to discuss two separate things. One is the
7 preface, and one is a summary. I think they're really
8 two different things.

9 Thank you.

10 MR. MEDINE: And just to clarify this, I think,
11 the preface puts in context the work that was done by
12 the various committee members and what the point of the
13 report was, and the summary would obviously summarize
14 the substance of the report.

15 MR. PLESSER: Correct.

16 MR. MEDINE: Okay.

17 All right, well, it sounds like we have a
18 consensus to defer -- oh, sorry, Greg.

19 MR. MILLER: I was just going to say -- Greg
20 Miller, MedicaLogic -- I would second Richard's motion
21 on one proviso, that we can have identified who, in
22 fact, was involved with the drafting of this so that
23 offline during breaks we can go talk to people and get
24 an understanding. Can we see a show of hands of who
25 participated with Ron to put this together so we have

1 people to go talk to at the break?

2 (Show of hands.)

3 MR. MILLER: Great.

4 MR. MEDINE: Okay, any further discussion
5 on this? The only other I guess -- oh, yeah, do
6 people want to identify themselves for the record
7 on that.

8 MR. LANE: Rick Lane, U.S. Chamber.

9 MR. KAMP: John Kamp, the American Association
10 of Advertising Agencies.

11 DR. SCHUTZER: Dan Schutzer, Citigroup. I want
12 to clarify, it was in the spirit of a preface, not in
13 summarizing the document.

14 MR. MEDINE: It was in the context of the
15 drafting of a preface which puts in context the report.

16 MR. ALLEN: James Allen.

17 MS. WHITENER: Rebecca Whitener, IBM.

18 MR. DAVID HOFFMAN: David Hoffman, Intel
19 Corporation.

20 MR. CERASALE: Jerry Cerasale, Direct Marketing
21 Association.

22 MR. WHAM: Should we refer to these as
23 the ACOAS 8?

24 MR. PLESSER: I have to say, I mean, I think
25 it's good that everybody's owned up to the process. I

1 think, you know, when I joined -- this is Ron Plesser
2 -- when I joined this committee, David told us there
3 was going to be a lot of work. I think that these
4 efforts have to be taken as sincere efforts to progress
5 the work, and, you know, any sense of identifying or
6 making fun of people who are making, you know, I think
7 a legitimate effort to try to forward the action here
8 and provide something in advance that people could look
9 at, you know, I mean we can fight about the size of the
10 table and all of that stuff, but the question is is a
11 preface document important on a substantive basis, and
12 I'm glad that everybody -- you know, and others -- and
13 there was others that were asked to participate, but it
14 was just something that, you know, we hoped would
15 forward the action.

16 So, either it does or it does not, but I think
17 kind of examining who did it and what was their motive
18 is just -- is frankly silly.

19 MR. MEDINE: Well, I think certainly one
20 benefit of this group to date has been its
21 transparency, and people get a chance to see what's
22 being discussed and comment on it before anything is
23 finalized, and I think that's the spirit in which this
24 discussion can take place, is that we have seen the
25 document and people can have a chance to express their

1 views about it.

2 So, I take it we have a consensus to adopt
3 Richard's suggestion of deferring this until we have a
4 clear sense of what the report looks like?

5 Let me raise one other issue before we jump
6 into the report. There was a fair amount of discussion
7 in yesterday's e-mail traffic over the more fundamental
8 issue with regard to access, which is should access be
9 a Fair Information Practice, do people -- and we -- I
10 think the Commission commissioned this group with that
11 in mind, but I don't know if people want to have a
12 discussion of the question or that we start with the
13 question of is access a part of Fair Information
14 Practices and the question is how do we implement that
15 or whether there should be access at all. There were
16 clearly opinions in yesterday's discussion online
17 that access may not be a basic premise that we start
18 from.

19 So, I -- before we again move on to the
20 substance of the reports, there was a considerable
21 amount of back and forth on that. I don't know if
22 people want to have a chance to weigh in on that
23 subject.

24 DR. GEER: Just a point of information. Could
25 you make sure I -- that those of us who don't do this

1 all the time know what you mean, Fair Information
2 Practice, whether there are capital letters involved?

3 MR. MEDINE: Sure. There are capital letters,
4 and that's -- and we basically refer to the
5 Commission's 1998 Report on Online Privacy where we
6 outline our summary of Fair Information Practices
7 derived from the OECD's 1980 guidelines, from the work
8 of the Privacy Commission, from the work of the
9 Commerce Department, and we summarize those into
10 notice, choice, access and security as the basic Fair
11 Information Practices, and again, look to this group to
12 give advice about how those might be applied or
13 implemented.

14 But again, I -- I would -- if people want to
15 make comments on the question of whether access is a
16 Fair Information Practice, certainly feel free to weigh
17 in on that.

18 Stewart?

19 MR. BAKER: Let me start out the debate by
20 arguing that what we have discovered in the course of
21 this discussion is that access is probably the most
22 difficult of all the Fair Information Practices that
23 have been laid out. It raises real privacy concerns;
24 that is to say, providing access is going to be a
25 vehicle for consumer theft of identity, for invasions

1 of privacy for people who use computers jointly, for
2 other kinds of problems that people will face, as a
3 result of guaranteeing access.

4 It's expensive, it isn't clear how many people
5 actually use it, and in many of the sorts of data that
6 we looked at, the principal reason that I would say
7 there's a good justification for access, which is
8 correcting incorrect information about you, is simply
9 not present. There's no reason to or way to correct
10 clickstream information. There's no reason to because
11 the information isn't used in a manner that prejudices
12 you the way a consumer credit report might, and there
13 isn't any feasible way for a company to say, Okay,
14 we're going to record the fact that this customer said
15 he didn't go to this site at this time.

16 Given all of the costs associated with granting
17 access, all of the difficulties from a privacy point of
18 view for consumers and the dubious value -- I recognize
19 there's a kind of consciousness raising or
20 accountability or whatever value in letting people see
21 what is being collected about them, but I do think that
22 could be done mainly through notice. That suggests to
23 me that if access is maintained as a kind of standard
24 part of the litany of data protection, it ought to be
25 very carefully -- it ought to be the one that comes

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1 with a footnote that says what we really are talking
2 about here is data that can be corrected, that ought to
3 be corrected because it has some adverse -- potentially
4 adverse effect on the person about whom the file is
5 maintained.

6 Outside of that context, it's very questionable
7 whether you need access and what purposes access serves
8 given all the costs. So, that would be my statement of
9 one side of this debate.

10 MR. MEDINE: Is the concept of reasonable
11 access perhaps another articulation of that position,
12 which is that access is not an absolute but that that's
13 something that depends on the type of information
14 involved and the importance of its use?

15 MR. BAKER: Yeah, I'm not saying that we should
16 take it out of the catechism, but I -- reasonable -- in
17 my view, most of what we have talked about, most of the
18 data we're talking about maintained by websites is not
19 -- ought not to be subject to access if you take a
20 reasonable view of what the access principle requires.

21 MR. MEDINE: Richard Smith? I'll also note
22 that Jonathan Smith is here.

23 MR. RICHARD SMITH: Yes, I just wanted to
24 follow up on Stewart's remarks. Obviously there are a
25 lot of angles on this story of access. I think the

1 important issue that I see that it brings to the party
2 is some checks and balances against companies
3 collecting data. A lot of times companies collect data
4 whether they need it or not, and if they have to
5 provide -- show what they're collecting, for two
6 different reasons -- one is the cost to them, and as
7 Stewart's already pointed it out, to provide access --
8 then they choose not to collect to begin with. So, I
9 think it's a very good thing.

10 Secondly, in my own experience and in
11 situations that I've looked at, when companies have to
12 reveal what they're actually doing, they would a lot of
13 times just rather not do it, and I think that's what
14 access is going to bring to the party here.

15 Thank you.

16 MR. MEDINE: Jim?

17 MR. TIERNEY: Jim Tierney.

18 Acknowledging Stewart's points that there
19 should probably be caveats on all four of these points,
20 I think that access is an integral part of Fair
21 Information Practices, and I think we shouldn't move
22 away from that, and for those of us who share Stewart's
23 views that we should minimize government involvement in
24 this industry, giving consumers the ability to access
25 their own information, allowing consumers to access

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1 their own information is obviously one of the
2 fundamental ways for enforcement to be put in the hands
3 of the people most affected.

4 MR. MEDINE: I thought that was a particularly
5 timely comment.

6 Richard?

7 MR. PURCELL: Strong endorsement for Mr.
8 Tierney's views on government interference with the
9 industry. Now strike it from the record.

10 Richard Purcell from Microsoft, whoever that
11 other one was.

12 Sorry, Stewart, access in my mind has to be
13 strongly on the table for a lot of reasons. I think
14 that it gets us into the delicate balancing act where
15 we ought to be, where we have to recognize the strong
16 data protection principles that are needed, yet the
17 transparency that Richard Smith has just alluded to
18 that is also needed in order to maintain corporate
19 responsibility.

20 I think the reasonable aspects have to be very
21 carefully thought through, and this is another area
22 where if we were to get overly broad mandates, we
23 actually could end up contravening the principle itself
24 by creating more holes in our privacy programs than
25 there are securities, not unlike a lot of interference

1 with security programs where gaps are intentionally
2 created and then exploited for some later purpose.

3 In my mind, access is one of the few direct
4 interactive tools that a consumer can be provided in
5 order to remove their uncertainty about a relationship
6 they have with their business, and we have to keep in
7 mind that access principles are one of the few ways
8 that consumers really can avoid discriminatory
9 practices based on false information, which is the, you
10 know, decades-old reason that access has been provided
11 in the first place.

12 Finally, from a technology point of view,
13 notice, choice, access, security and enforcement are
14 nice acronyms, and we need the vowel as much as
15 anything.

16 MR. MEDINE: Andrew's name starts with a vowel.

17 MR. SHEN: Andrew Shen.

18 Before I start, I have several points that are
19 important, but I actually want to thank Stewart for
20 bringing this up, because I think it's an important
21 thing to get on the record why it should be a part of
22 Fair Information Practices and has been a part of Fair
23 Information Practices for decades at this point.

24 The first point, why do we need to correct this
25 information and why should consumers be able to correct

1 this information? And I think the obvious answer is
2 because companies use that information, and companies
3 don't collect this data, put it into databases, analyze
4 the data, mine it, et cetera, et cetera, if they are
5 not going to use it, and how they use it affects a
6 consumer in some way.

7 I hope some of you at least had the opportunity
8 to read the article I forwarded around, it was a recent
9 Business Week article that said that -- well, it
10 hypothesized how companies could use all this personal
11 information to conduct sort of online redlining, what
12 they call weblining, in which some customers would
13 probably get better treatment based on what they know
14 -- companies know about their behavior.

15 The second point is that -- and I think really
16 a much more pressing point is that we really need to be
17 concerned with what consumers think of the internet
18 today. In some ways putting more transparency, putting
19 accountability into the system will make customers feel
20 comfortable with the amount of information collecting
21 that goes on online, and the internet is a very
22 information-intensive experience. A lot of companies
23 like that interaction, a lot of companies collect a lot
24 of data.

25 And third is that really we can start

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1 considering high levels of access online, because it's
2 fairly easy. I mean, that's one of the best things
3 about the internet. That's why e-commerce has taken
4 off. It's very easy to interact between an individual
5 and a business and something we should take advantage
6 of and keep in mind in figuring out how to implement
7 access.

8 Finally, on the very last point, I'm kind of
9 confused why someone actually thought that access would
10 somehow threaten privacy in itself. I think what we
11 see is that there are various ways and various methods
12 by which people authenticate themselves online to do
13 very sensitive business transactions, like when people
14 trade stocks, when people check their accounts online.
15 That's obviously all sensitive data and things that
16 people can check online reasonably without threats to
17 security.

18 MR. MEDINE: Do you want to respond?

19 MR. BAKER: I -- thanks, Andrew, I -- Lyndon
20 Johnson once said, when Sam Harvey started a meeting
21 with I'm just a country lawyer, he would say, Hold on a
22 minute, when I hear that in this town, I always reach
23 for my wallet. So, I think that way when people thank
24 me for raising an issue.

25 I think the risk to privacy, clearly there are

1 circumstances in which you will have -- everybody knows
2 from the start that your access is sensitive and
3 requires control, and numbers and other authentication
4 devices are handed out at the start, and in those
5 circumstances, it's much -- there's less risk to
6 privacy and providing access.

7 The risks that I see in providing access arise
8 from other kinds of data collection which may be quite
9 extensive and may be personally identifiable but which
10 are based on the fact that you have a credit card
11 number and a delivery address, and that's all that's
12 necessary to complete the transaction. You're never
13 asked to enter a special PIN number, never assigned
14 one.

15 When you go back and ask for information about
16 your account, I mean, we live in a world where private
17 investigators engage in pretext calls all the time.
18 Once they know that they cannot be refused, if they
19 pretend to be the person they're investigating, if they
20 can get the credit card number of that person, they can
21 start calling people and asking for their information
22 as of right.

23 In those circumstances, unless there are brand
24 new authentication requirements imposed on consumers
25 who want to get that information, there are going to be

1 substantial invasions of privacy. We haven't solved
2 the question of liability for that. We haven't figured
3 out a way to solve the question of liability or a good
4 way to solve the authentication problem across the
5 board. So, I see that.

6 I also see the problems associated with machine
7 identifications, cookies, in which people say, Hi, I
8 have this cookie on my machine, as you can verify, I'm
9 online, tell me where this machine has been in the last
10 24 or 48 hours. You don't really know that that's the
11 only authorized user of the machine. So, all of those
12 are circumstances in which there are real risks to
13 privacy.

14 MR. SHEN: Well, I'll agree with you that there
15 is no such thing as perfect authentication, no such
16 thing as perfect security, but I think we have sort of
17 those tools in place where we can provide a fairly high
18 level of both, and I don't think there has to be any
19 necessary sacrifice of one for the other, and I think
20 some of the options that are laid out in the document
21 and some of the pros and cons of each authentication
22 option sort of analyze the things that you brought up.

23 MR. BAKER: Yeah, it raises substantially the
24 cost obviously of access, and I guess I do disagree
25 with the suggestion that access is a good idea because

1 it costs money and it's a tax on collecting the data in
2 the first place. If we thought it was a good idea to
3 have a tax on collecting data, we could suggest that.

4 MR. SHEN: Well, I don't think -- I'm sorry, I
5 don't want to --

6 MR. MEDINE: Why don't we follow up around the
7 table.

8 MR. SHEN: If I could just respond very
9 quickly, I think Richard's point earlier about how this
10 may affect -- may encourage data minimization is a good
11 one, but I don't think that's a primary reason why
12 access is in place.

13 MR. MEDINE: James?

14 MR. ALLEN: James Allen. I find myself
15 agreeing with some of what almost everybody around the
16 table is saying.

17 First of all, I believe very strongly that
18 access is a fundamental part of the Fair Information
19 Practices, has been defined as such for, as Andrew
20 said, for certainly more than a decade, but, you know,
21 it's very important -- I think the transparency that
22 Richard referred to is also a very -- is, you know, a
23 very important concept, that -- that trust between
24 consumers and businesses, between businesses and
25 businesses who do business with each other, is -- is

1 fostered by having a degree of transparency, of
2 openness. It's what our society is sort of built on.

3 The fact that everything we say in this room
4 goes up on a website is fundamental to the way we set
5 policy and so forth in this country, and it's the way
6 we're used to doing business with each other, and I
7 think that transparency is very important, but it can
8 come in different ways.

9 Mary has made the point -- Mary Culnan has made
10 the point several times that good notice can serve the
11 purpose maybe as well as good access can. I think
12 Stewart's point that reams of clickstream data may be
13 showing -- you know, giving direct access to the
14 consumer through reams of clickstream data probably is
15 not of great value to the consumer, and, in fact, the
16 consumer probably wouldn't know what to do with that
17 data, and it's expensive to do, but giving the consumer
18 notice that the data's being collected and for what
19 purpose it's being collected and the consumer some
20 choice in whether that data continues to be collected
21 and used in that manner I think is important.

22 So, I think we need to balance these other
23 tools we have, though we weren't charged with notice
24 and with choice. I think we should be able to balance
25 our recommendations regarding access with

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1 recommendations about notice and choice and the kinds
2 of data that access should be given to.

3 Stewart's concern about the ability to, you
4 know, violate somebody's privacy maybe by getting at a
5 credit card number, well, the industry has figured out
6 a long time ago that, you know, you can show people the
7 last four digits of a credit card number to show them
8 that you have a number about them, and then you can
9 give them the ability to change that number and specify
10 a new number if they don't like the one they have. You
11 don't have to show people the whole number.

12 So, there's different ways you can give access
13 to information that does protect their privacy, ways
14 that the industry has been using for many years. So, I
15 don't think we should steer away from access at all. I
16 think we should encourage it, but we should balance it
17 with other needs, choice and notice specifically.

18 MR. MEDINE: Thanks.

19 Deirdre?

20 MS. MULLIGAN: I wanted to actually chime in
21 with James' points. I have been quite heartened by the
22 number of times I've heard the words "fundamental
23 principle" used. I believe James used it, Richard,
24 Richard, Jim, Andrew, which is a cross-section of
25 people around this table, and my hope is that, in fact,

1 people did come to this table with the recognition that
2 the FTC's annunciation of access as a very fundamental
3 concept is a good starting point, but I think that as
4 Stewart has pointed out, there are some risks that we
5 do have to address, but I think that that doesn't make
6 them unaddressable.

7 Issues of authentication, they're pressing in
8 this context, and my guess is that they're even more
9 pressing and that there are many folks in the industry
10 working to address them in contexts that have nothing
11 to do with access. They have to do with payment, they
12 have to do with control over systems, and that the -- I
13 think the challenge here is to make sure that tools are
14 deployed in an appropriate way and to think about how
15 we can enable access in a way that doesn't impose those
16 risks.

17 So, I hope that we -- that I continue to hear
18 the notion that this is a fundamental principle, and
19 the question is, in what context -- in what cases does
20 it run into conflict with other principles? I think
21 there are areas where it does. It may expose someone
22 else's data. Areas where, you know, if you look at
23 something, even like the Privacy Act, we have concepts
24 of trade secrets, we have concepts of state secrets,
25 that there are areas where the access principle does

1 give way, but that does not mean it is not an important
2 principle and something we should be striving for.

3 MR. MEDINE: Down the line, Dan, Lance, Dan.

4 DR. GEER: Thank you, Dan Geer.

5 I think maybe I'm on the same wavelength as
6 Stewart on one part of this, so let me see if I'm
7 right. If you approach all information, all the
8 information issues we're talking about here, as a risk
9 management problem, then the rational position is to
10 match the protections to the risk in some sense. The
11 classic slang "I've never put a thousand dollar lock on
12 a hundred dollar door" comes to mind.

13 I think where you were going, Stewart -- and if
14 I'm right, I'd like to know -- is that if we insist
15 that all data be treated as equally important, that if
16 it's about me, I have access to it, regardless of
17 whether it is the inadvertent visit to a website
18 because I didn't know how to spell or whether it's
19 because I am amending my birth certificate or anything
20 in between, and if we treat all of those things as
21 having an equal access requirement, the only way out
22 technically of which I am aware is what I would refer
23 to as identity culture in which everything I do has my
24 unmistakable, nonrefutable thumbprint on it in an
25 electronic sense.

1 I would argue that if we insist that all data
2 be treated as equally valuable with respect to the
3 requirement for providing access, then the only way to
4 avoid a collapse of privacy is to step back and say our
5 trade-off is an identity culture. I think that's
6 dangerous. I'd be happy to debate that at length. I
7 don't think it's the core issue today, but I just want
8 to be careful that the law of unintended consequences
9 doesn't take us in that direction. That is -- would
10 make it worth -- avoiding that would make it
11 worthwhile, my participation here.

12 MS. MULLIGAN: David, can I just respond to
13 that?

14 MR. MEDINE: Sure.

15 MS. MULLIGAN: Dan, I share some of your
16 concerns that in the drive for authentication we
17 unintentionally head to perfect identification, and I
18 think that if you look at, going back to the first
19 document of the authentication subcommittee, which at
20 that point I was not on, they made a very clear
21 distinction between authentication and identification,
22 that those things are not synonymous and that in our
23 strive to do authentication, we should not seek to
24 collect more information, seek to create an
25 identification culture.

1 I agree with you that there are risks and that
2 we should be cognizant of them, but I don't agree that
3 that's a necessary conclusion of an attempt to provide
4 access.

5 DR. GEER: Not an attempt but a blanket
6 statement that access to all data about me must be
7 provided leads, I believe, inexorably, you have to make
8 sure it's me no matter what I'm doing.

9 MS. MULLIGAN: I don't think that's accurate.
10 I mean, we have seen --

11 DR. GEER: I think it's a law of physics.

12 MS. MULLIGAN: Dan, there are many, many
13 systems that are set up today where you can get access
14 based on your account, and you did not use your name or
15 any other identification information to establish that
16 account.

17 DR. GEER: Absolutely, absolutely.

18 MS. MULLIGAN: Okay, so physics has failed
19 there.

20 DR. GEER: No, no, that is saying that we
21 endorse -- we recognize the physics and we endorse
22 pseudonymity.

23 MS. MULLIGAN: Right.

24 DR. GEER: If that's the way we want to go, I'd
25 be happy to have the pseudonymity discussion here.

1 Ms. : Well, I think --

2 DR. GEER: In fact, I think arming the populace
3 with pseudonymity is the best thing that could happen.

4 MS. MULLIGAN: I think that's one of the
5 reasons that we're here discussing authentication in a
6 robust way that goes beyond assuming that it means
7 identification. I think if you look at the
8 authentication document, it very clearly addresses the
9 notion of pseudonymity. I think perhaps we need to put
10 the word in, but it very clearly addresses it.

11 So, you and I, I think, are in violent agreement,
12 but I don't want the -- I don't want a suggestion on
13 the record that access is going to lead to an
14 identification culture, because I think that part of
15 the reason we're having a very complex discussion is to
16 ensure that that is not the outcome, to defy physics.

17 MR. GEER: Well, I attempted to put it on the
18 record, so there we are.

19 MR. MEDINE: And we were asked by one of the
20 committee members to take up authentication earlier in
21 the discussion rather than later, because the committee
22 member couldn't be here and wanted to take up the
23 issues when they arrive, so we may want to move into
24 authentication, but a couple of people had their cards
25 up.

1 Lance?

2 DR. LANCE HOFFMAN: I also am hearing vehement
3 agreement, not violent, vehement agreement --

4 MS. MULLIGAN: I like violent.

5 DR. LANCE HOFFMAN: Let the record show that
6 Deirdre likes violence.

7 MS. MULLIGAN: Stewart knows that.

8 MR. MEDINE: The FTC has a separate study of
9 violence going on if you want to join that.

10 MS. MULLIGAN: Strike all that.

11 MR. WHAM: Can we install a lock on Deirdre's
12 microphone here?

13 DR. LANCE HOFFMAN: I also want to be very
14 careful about the law of unintended consequences, which
15 is exactly why I think that the way at least the words
16 on one of these drafts articulated access wasn't
17 appropriate, because it limited access, as I read it,
18 to correctable data collected by the first company, and
19 I don't -- access is more complex than that.

20 Actually, David, about ten minutes ago, stated
21 this perfectly, reasonable access. I think everybody
22 would agree on what's reasonable access, but then the
23 point is, are we going to define "reasonable" around
24 this table this morning? And the answer is no. That's
25 why the word "reasonable" is so nice, just like doctors

1 should do no harm, people doing -- doing things that
2 end up in computer code should delay binding time until
3 the last possible moment, and given that, I would
4 suggest we don't escalate this up to the preface or
5 summary or whatever it is, except for the word
6 "reasonable." All these other discussions can be dealt
7 with in the body where they belong and have been to a
8 large extent.

9 MR. MEDINE: Dan?

10 MR. JAYE: I think like many people I agree
11 with a little bit of what everyone is saying here, but
12 particularly Deirdre's comment about sometimes access
13 gives way to other principles, you know, at the start,
14 I certainly say that like I think many people here,
15 access is a fundamental principle, and it's a place
16 where we start, but the comment that I would make is
17 having experience and actually going -- working with
18 other jurisdictions that have legislative requirements
19 to enforce these principles, what I'm afraid of is what
20 I've seen, is a dogmatic application of the sort of
21 broad terms without looking at the compromises and the
22 issues.

23 There are -- one of the concerns I have is that
24 there's an assumption that when a business or an
25 organization is saying that access is not appropriate

1 in a certain case, that there is something underhanded
2 or there is something pejorative to the consumer going
3 on, and I just would want to make the statement that
4 often -- and in specific cases that I know of -- it's
5 specifically because the business is trying to do the
6 right thing. It's made a commitment to privacy. It
7 actually thinks that not providing access in certain
8 circumstances, given the fact that there may not be
9 synonymous authentication possible in those
10 circumstances, is the business specifically trying to
11 uphold its privacy policies.

12 MR. MEDINE: Okay, Dan?

13 DR. SCHUTZER: First of all, I want to clarify,
14 I certainly agree that access should be a fundamental
15 principle and even to the extent that I think that
16 we're underselling how important data is. Now, not all
17 data is as risky, but I venture you can talk about
18 clickstream data, I can almost envision a business plan
19 I would have as to how I could use that data for a
20 customer to provide many interesting uses. So, I think
21 that we can't anticipate how useful a lot of this data
22 will be for the consumer.

23 On the other hand, though, I think it should be
24 clarified that -- that in order to provide that access,
25 that it's a -- it's a sticky problem. So, we should

1 recognize that, and I think we have recognized that. A
2 lot of people have seen -- and I have had some
3 difficulty with the authentication section in terms of
4 it -- it almost makes it sound too simple. You know,
5 it uses some -- it talks about some practices that I
6 think are ill-advised practices in terms of making it
7 too easy to socially engineer, use the same channel,
8 just to provide access. There's a lot of weaknesses,
9 several things that have been said.

10 So, I think we should acknowledge the
11 fundamental principle of access, and we should also
12 acknowledge the difficulties and the -- in terms of
13 authentication. As with security, it's an imperfect
14 process, and we'll be working to make it better, and we
15 don't -- and as you said, we don't want to make it
16 better by moving it in a direction where it would
17 become an identity-based society. So, it's not a
18 totally resolved issue.

19 It's something we will continue to strive to do
20 better on, but we are sort of responsible to do our
21 best to provide our customers access in a safe and
22 secure way to maximize the chances of privacy, and
23 we'll get better at it, and we'll have to take risks --
24 we'll have to take liability consequences when problems
25 arise.

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1 MR. MEDINE: Frank, and then Ted?

2 MR. TORRES: I think since the beginning, when
3 Stewart first made his comments, that this has been
4 probably one of the most productive discussions that
5 this group has had and has laid out some really good
6 issues, and perhaps we need to go back ourselves and
7 look through the transcripts and perhaps use some of
8 what has been articulated, because I think some of the
9 points are very well put out, but in listening to some
10 of this, I'm getting more frightened, and I'm sure I'll
11 get even more frightened as we move into the security
12 discussion and come to the knowledge that maybe there's
13 no way to provide 100 percent security for data, even
14 sensitive data.

15 Perhaps one solution to all of this, and it
16 would help simplify the process of even drafting a
17 report, we probably wouldn't even need an executive
18 summary, is just to come to the conclusion that we
19 shouldn't allow data to be collected in the first
20 place.

21 But falling short of that, and I doubt that we
22 will reach that conclusion, that we do need to take a
23 reasonable approach, and in that way I do concur with a
24 lot of the comments that have been made, and if we
25 remember that access doesn't exist in a vacuum, that,

1 you know, for some -- and I think Jim pointed this out,
2 that, you know, for some, in getting to notice, that
3 might make a consumer not reach the conclusion that
4 they need access to the particular bit of information
5 or the lines of code or something like that that shows
6 where they -- where they've been.

7 Certainly a trigger, though, is where
8 information is used to make a decision about the
9 customer, and that gets to redlining. The problem,
10 though, is in today's society, it's difficult to know
11 what information is being used to make the decision.
12 You know, it used to be credit information. Now I
13 understand that it's a lot more than just that. So,
14 how do we -- how does a consumer, first of all, know
15 how it's being used and then make sure that they are
16 able to get it and correct it if it's wrong?

17 I appreciate the concerns about will access
18 lead to privacy intrusions, but to the extent that a
19 lot of this information is collected, and as Andrew
20 said some time ago, is being used, sold, shared, used
21 to make decisions, then to me that shows that if the
22 company can access it to digest it and sell it, then
23 the consumer should also have access to it. So, maybe
24 what I'm trying to get at is perhaps some places where
25 we go for the reasonableness test, and I concur with

1 Deirdre that to the extent that many people around the
2 table believe that access is a fundamental principle,
3 that that's important.

4 Just one sidelight, too, I also do a lot of
5 work on the e-signature legislation going through
6 Congress now, and it's interesting, because in that
7 concept they're trying to get consumers to buy into the
8 idea that you should be able to do contracts
9 electronically online, and if I'm a consumer and want
10 to sign on, then I use my digital signature to do that.
11 Presumably the technology will be there to ensure that
12 it's only you that can sign your name to a document
13 online. To me, if a consumer's unable to have the
14 assurance that that digital signature cannot be
15 compromised, then it -- without that assurance, the
16 whole system falls apart.

17 So, you know, I'm wondering if we can take
18 those concepts, that consumers will have this digital
19 signature, and use that as the door-opener to allow for
20 access and maybe address some of Stewart's concerns.

21 MR. MEDINE: Okay, Ted, Ron, Stewart, Larry,
22 then I would like to go more explicitly into access
23 three, which is the authentication we have been
24 touching on quite a bit, and I think Dan has given
25 us some excellent openings to that.

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1 MR. WHAM: Ted Wham.

2 When the question was first raised by David
3 talking about whether access is a fundamental
4 principle, which is kind of like he took a big red flag
5 and proceeded to bounce it around over me, and probably
6 a good thing, allowed me to be a bit more reflective.

7 When I joined on this committee, I must admit
8 that I thought that my viewpoint on the world was a
9 fairly liberal viewpoint, and I've now come to
10 recognize that I'm a little bit to the right of Atilda
11 the Hun, you know, compared to some of the people here,
12 and hopefully, as part of my defense, I can, you know,
13 call on the extrapolation of a quote from Winston
14 Churchill who said that anybody who is not a liberal in
15 his youth has no heart and who is not a conservative in
16 his adulthood has no head, so perhaps I can use that as
17 a defense.

18 When I look at access and we talk about it as a
19 fundamental right, I get concerned, because I am not
20 one who shares the opinion -- Deirdre will not able to
21 use me as example -- who thinks that access, there is a
22 per se fundamental right to it --

23 MS. MULLIGAN: Principle, I said principle.

24 MR. WHAM: Principle, I won't be on that list
25 either. Instead I think that access is much more of a

1 continuum, and to look at it and to describe it as a
2 fundamental principle is to look at it and describe it
3 in a very binary manner, and even putting the caveat to
4 it reasonable access is to instead say, Well, you have
5 got access in the following, you know, areas, but then
6 it's binary within that area, and I think that that
7 misses a lot of the different things that are proven.

8 Access is very positive in many, many ways. I
9 believe that the information that I provide online to a
10 third-party company, I should be able to have an
11 opportunity to view it, I should have an opportunity to
12 edit it and change it and update it as I have the need,
13 I should have the opportunity to, at a minimum, disable
14 it and hopefully delete it, although there are some
15 technical implications to deleting it. I would
16 advocate those as being very prohibitive.

17 On information that is directly observed about
18 me, such as my clickstream data, I believe that there's
19 a real public policy interest in allowing viewing of
20 that data. I do not share the opinion that there is a
21 value in allowing that to be edited or challenged, as
22 is in some of the documents here, which is frightfully
23 expensive for the companies to be able to support that
24 type of standpoint, but I believe that there's some
25 value in there to be able to view that information and

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1 know what is being collected about you.

2 When you start to have information about what
3 is inferred about me, such as the decisional data
4 that's had a lot of discussion, I start to stray from
5 the opinions which have been shared here. I -- and
6 when you have things that the -- especially from a
7 marketing standpoint that the companies are doing to
8 target marketing programs to me and which sometimes are
9 given the pejorative name of weblining, I would argue
10 that that actually serves a public policy interest,
11 that that is an efficiency standpoint, that taking the
12 information about what a customer has done online and
13 offering segmented layers of services and discounts
14 promotes economic efficiency and that that is something
15 that instead of saying we don't want to happen, we
16 should actively be saying we do want to happen.

17 I want to take my customer who does the
18 greatest amount of business with me, never returns a
19 product, who always comes back and uses my service, and
20 I want to answer the telephone call on the first ring
21 for that guy, and I want the "Hoighty Palloighty" to be
22 at the back of the line, that people who offer
23 difficult problems for me, who are never happy with my
24 service, who are coming through and are returning
25 products, those are the people that I want to offer a

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1 differentiated level of service. If that's called
2 weblining, so be it.

3 I don't believe that we should be able to offer
4 differentiated levels of services based upon somebody's
5 age, based upon their gender, based upon other types
6 of, you know, protected class information. I'm not --
7 I'm hoping that -- and that's the problem with
8 "weblining" as a term, is that it's linked to
9 redlining, which is based upon, you know, race
10 barriers, and I'm not advocating any type of that, but
11 I am saying that you do want to have different levels
12 of service.

13 I don't want to have to tell my customer why
14 I'm coming to that decision, because if I allow
15 complete transparency into that, then that impacts my
16 ability to offer that variable level of service, and
17 that's not something that I believe the FTC or the
18 members of this committee should be advocating.

19 The next thing that comes through from this is
20 the access to whose data. Just because it's about me
21 doesn't mean it's my data, and that harkens back to the
22 example that I gave earlier that was a source of, you
23 know, of another, you know, ribbing that I received
24 before this meeting here this morning about, you know,
25 what information I have about the other members of this

1 committee and the opinions and the inferences that I've
2 drawn about you within my private, you know, outlook
3 context, right?

4 And there was discussion, Well, gee, Ted,
5 that's you as a person, but I would argue that the same
6 type of inferences are made in a business type of
7 setting where a salesman will make decisions about
8 their customer and will offer different levels of
9 service around that. Even though it's about the
10 customer, I don't believe that the customer has a right
11 to access that information, even in the view
12 standpoint, and I don't want to have to live in a
13 society where everything that I think about somebody
14 else in a business setting or in a personal setting is
15 available to those other people. I don't think that
16 that's the type of society that we want to, you know,
17 really work towards.

18 The last thing is that, you know, this is my
19 drum that I keep coming back to, and that is that if
20 we're going to talk about right of access as this
21 absolute, that everybody has a right to see everything,
22 then I want to continue to harken back to the areas
23 where that is not an equivalent right in a non-online
24 setting and that that sets undue burden for online
25 businesses.

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1 So, again, to use what are presumptive examples
2 here, I don't believe that I can go to Richard Purcell,
3 who represents Microsoft, and say, Richard, can
4 Microsoft tell me everything it knows about me and
5 everything it's ever sent to me in an e-mail and
6 everything it's ever sent to me in direct mail and
7 every customer service activity that I've ever done
8 with that company? I don't believe that you can do
9 that. I don't think that you should have to do that.

10 I don't think I can go to Frank Torres, who
11 represents Consumers Union, and say, Can you tell me
12 every time you solicited in a direct mailing to me to
13 sign up for the Consumers' Reports Magazine? I don't
14 believe that I as a consumer have a right to that
15 information. I don't think that we're really screwing
16 the customer if we don't give them the right to that
17 information.

18 At a minimum, I would not want to see a
19 differentiated level of service where in an online setting
20 you have to do that; offline, you don't have to do that.
21 So, in total, to sum it up, access is a continuum; it's
22 not a binary decision. It is something where it has
23 privacy risks for the consumer. If I have an absolute
24 right of access to information about my clickstream
25 data, then presumably my employer can sit down at my

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1 computer at work and say show me everyplace where this
2 computer has been, and an employer just out of the same
3 rights of law where they can see my e-mail stream and
4 make decisions about whether to fire me based upon my
5 e-mails, even personal e-mails, could can me based upon
6 because we have done the consumer a favor by offering
7 access to that and based upon the fact that access to
8 whose data, just because it is about the customer, does
9 not mean it is owned by or belongs to the customer.
10 Very, very difficult. I don't believe it's an
11 absolute.

12 MR. MEDINE: Well, we will give premium service
13 to Ron Plesser and call on him next.

14 MR. PLESSER: I think part of the -- there is
15 no question that access has been kind of in every
16 iteration of Fair Information Practices, really
17 starting in the HEW report of 1974, which really was
18 Attorney Willis Ware's (phonetic) work and others.

19 The question, I guess, is really I think the
20 controversy has come under the word "fundamental." I
21 mean, it is a Fair Information Practice principle. The
22 question is what -- first of all, what does
23 "fundamental" mean and what does it add to the debate?

24 I guess if I had to choose between the five
25 which I thought the fundamental one was, it would be

1 notice, because I think that's over which everything
2 kind of grows. If you don't have notice, nothing else
3 can -- can move, but saying that, I don't think there's
4 much value in talking about which one is fundamental,
5 and if they're all fundamental, if all five are
6 fundamental, what's the value of picking -- of saying
7 that they're fundamental? I mean, I think that's part
8 of the question, I think, that Stewart was aimed at.

9 The other thing is that, you know, if you look
10 back in written material that we are now going to view,
11 there is a lot of this in there, and I think not only
12 is it the authentication issue, it's also to me the
13 retrievability issue. You may have a database
14 organized in a way where information about an
15 individual can't be retrieved by the name of
16 that individual, but yet you have it there, and so one
17 of the questions is do you have to create
18 retrievability mechanisms to retrieve information that
19 you wouldn't -- that you wouldn't do but for access?

20 So, there's a lot of issues there, and I think
21 that the concern is that it's not really clearly stated
22 as you go through the report, that there may be
23 circumstances when access is not appropriate, that
24 there are -- you know, I think part of the options
25 really need to reflect that there are some

1 circumstances where access would -- you know, is
2 balanced in such a way that it would be
3 counter-productive or wouldn't be appropriate or would
4 be dangerous to other privacy or other -- the other
5 kinds of interests that were suggested.

6 So, I think the issue isn't whether or not it's
7 fundamental. It's an issue of how is it balanced. I
8 think the reason why the debate is here is that the
9 documents, even the very fine, you know, summary that
10 Steve Cole did on the so -- on his proposal doesn't
11 really clearly say that there are some circumstances
12 where access can create some problems, and I think in
13 my interpretation that's what Stewart was trying to
14 focus us on, and I think that that can be done in the
15 report.

16 I think, you know, we could wind up with a
17 summary, whether or not we have it, but I just think we
18 should get off this word "fundamental" and just talk
19 about it as a balanced right and when it's appropriate
20 and when it's not. And there are circumstances when
21 it's not appropriate.

22 MR. MEDINE: And for the record, Steve Cole is
23 here.

24 Stewart?

25 MR. BAKER: Well, I really appreciate Ted

1 explaining why my calls are not returned when I call
2 the cable company.

3 Actually, what I thought I would do is, in the
4 interest of trying to draw this to a close or at least
5 --

6 MR. WHAM: If he paid his bill, his calls would
7 be returned.

8 MR. BAKER: There we go. I got access and all
9 of you did, too.

10 Let me suggest --

11 MR. MEDINE: Not much security, right?

12 MR. BAKER: -- four or five points and try to
13 tie them to drafting issues that I think came out of
14 this discussion, which I do frankly think has been very
15 valuable.

16 First, once you -- if you put "reasonable" in
17 front of "access," practically everybody can agree with
18 access, as long as, you know, you leave the room to
19 disagree about what "reasonable" means. So, my first
20 suggestion is that whenever we talk about access, we
21 put the word "reasonable" in front of it and that we
22 make it clear from the first sentence that there's room
23 for lots of disagreement about what -- when access is
24 reasonable. So, that's -- that would be my first
25 suggestion. We could make that change right in the

1 introduction.

2 The second point that I thought I heard some
3 agreement on is that it is at least relevant whether
4 people are being granted or denied benefits on the
5 basis of the information. Is this information being
6 used to hurt you or help you or is it just information
7 that influences what ads you see?

8 I think everyone -- there would be a lot of
9 disagreement about whether that is determinative. I
10 think it probably ought to be, but lots of people would
11 not think that, but I think it ought to be added to the
12 list of factors to determine whether access is -- you
13 know, what kind of access determination should be made,
14 and that's, again, at the end of that first paragraph
15 in the access discussion.

16 The third thing that I think I heard from a
17 fair number of people is there is some privacy risk
18 associated with access, and people would say maybe it's
19 fixable, maybe it's not as bad as I think it is, but
20 there's some risk. I don't think we've acknowledged
21 that, at least in the introduction to this section, and
22 we should have a sentence that acknowledges that there
23 are privacy risks associated with it and liability
24 concerns that are legitimate.

25 The last point, and this is -- this is just one

1 that I -- perhaps I don't understand what is being
2 summarized, but in the fourth paragraph of this
3 overview of the access or the reasonable access
4 section, there's a statement that during the meetings,
5 the committee concluded that where information is tied
6 to a specific identifier, a name, address or unique
7 identifier, access could be provided. I couldn't tell
8 whether that was basically a conclusion that there was
9 a consensus that we should always provide access in
10 that context or not. I think we should make that
11 clear, that it is possible to do it, but we're not
12 saying --

13 MS. MULLIGAN: Right, it's a "could," not
14 "should."

15 MR. BAKER: Okay, I think perhaps that in this
16 context, as a summary, it -- it could be more clear
17 that we're just saying that it is possible to provide
18 access.

19 MS. MULLIGAN: Yep.

20 MR. BAKER: And my last, I hope,
21 unobjectionable comment on this section would be this
22 is not a summary of the entire report, and therefore,
23 it's inappropriate to have that last paragraph that
24 talks about the determinations on security.

25 MS. MULLIGAN: Yep.

1 MR. MEDINE: Okay, Larry, then I would like to
2 try to shift, if we can, to focus more specifically on
3 the access three discussion.

4 DR. PONEMON: What an act to follow, my God.

5 About six weeks ago, we talked about an ethics
6 framework, and this is the first time we have actually
7 had a conversation about a fundamental principle, so I
8 am very happy that we're talking about it. It may be a
9 little too late in the process.

10 I think the fundamental principle is not
11 access. I think the issue is transparency from the
12 consumer's perspective. I think we get there by
13 providing access, we get there by providing
14 notification, we get there by providing other legal and
15 social mechanisms, but it's not a fundamental
16 principle. Transparency is the fundamental principle.

17 So, it goes back to the point that was raised
18 that ultimately you want to make sure that good
19 companies do good things and that if there are bad
20 companies doing bad things that you know about it
21 immediately and you don't do business with them.

22 I think that the concern that I have based on
23 real experience is the word "reasonable access." Once
24 you put a wiggly word in front of an important concept
25 like access, you open up a floodgate of problems, and I

1 think that if we endorse a wiggly word like
2 "reasonable," we are creating some potentially negative
3 consequences to the consumer. So, I'd like us to think
4 about that at the -- over the course of the next few
5 minutes of our break.

6 MR. MEDINE: I'd like to turn now I guess more
7 specifically to the access three, and some have
8 described it as too simple, ill-advised and social
9 engineering. So, perhaps we might consider whether or
10 not we're comfortable with the access -- I know we're
11 -- let's -- on authentication?

12 MS. MULLIGAN: Yes, I am happy to do it, but
13 can I just make a rejoinder?

14 MR. MEDINE: I'm sorry, I'm focusing on
15 authentication. This is the third -- the access three
16 group.

17 MS. MULLIGAN: Can I make a --

18 MR. MEDINE: Yes, access three is the third --

19 MS. MULLIGAN: I just have a quick follow-up to
20 Larry, but my quick follow-up to Larry is I share
21 Larry's concern, and I think that perhaps a more
22 finessed way to deal with issues of reasonableness is
23 to say access is the principle, there are reasonable
24 areas where access is limited or comes into conflict
25 with other issues, and to list them and say there are,

1 you know, trade secret issues, there are areas where
2 the data may actually come at a risk to somebody else's
3 privacy, very clearly enumerate so you don't create a
4 very broad legal realm, but you do say that there are
5 other things that compete here in a much more clear way
6 that don't create that same kind of cloudiness. So, I
7 would like to put that -- because I share the concern
8 of putting kind of a blanket "reasonableness" clause
9 in.

10 MR. MEDINE: Just to clarify, we are going to
11 focus on authentication in the access context as
12 opposed to authentication in the security context,
13 although one question we might want to address is what
14 is the relationship between the authentication concept
15 as it applies to both access and security.

16 Deirdre?

17 MS. MULLIGAN: As one of the co-chairs or
18 co-writers of the authentication subgroup, I wanted to
19 respond to some of Dan's comments.

20 Dan, your comments were completely well taken.
21 There was -- we could not reconvene in order to address
22 them, because a lot of it was gut everything that you
23 did and throw it in someplace else, and we couldn't
24 really do that in the time frame that we had.

25 I passed out a two-page document that looks

1 like this, which was an effort to show people -- right
2 now we have a very long garble of text, and what I
3 would actually propose to do with the document as we
4 move forward is to pull out some of the -- for example,
5 I think Dan assumed that the case studies were supposed
6 to be "This is how you should address this issue,"
7 rather than a case study, "Here's an example of options
8 that somebody could pursue," and that this might then
9 be further narrowed to say this is the way in which we
10 think it would be best, as an example, not as a "This
11 is the social engineering, this is what every business
12 should do," but to give people some concrete examples
13 of what it is that we're talking about.

14 I agree with you that some of them are very
15 simplistic. I also think that some of our audience is
16 going to be not as well versed in some of these
17 issues as you are, and my kind of invitation would be
18 if we could work towards two or three examples that
19 give people the notion of, okay, you don't want to --
20 in trying to authenticate, you don't want to do the
21 massive identification sweep, so here, these are kind
22 of the considerations, here's how to deal with that,
23 you know, but -- so, what I'd hoped we'd be able to do
24 with the document is put a lot of the pros and cons,
25 the case studies, into sidebars, so that there

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1 would be some nice flow of text, whether it's the
2 discussion, you know, in the security section, here's
3 the standard that -- if you look at page 2, the
4 government-established sliding scale, and then have a
5 pull-out box that has here are the pros and cons, so
6 that people can both kind of read the document in a
7 little bit more of a wholistic way and understand there
8 are little things that they can pull out and look at.
9 I thought that that might address some of your
10 authentication concerns.

11 The other piece is I agree with you that a lot
12 of this is about security, and I also, as you see,
13 folded a lot of it into the conversations about access
14 more generally. So, I just want to say that I think we
15 agree with many of your concerns and want to address
16 them.

17 MR. MEDINE: Dan?

18 DR. SCHUTZER: Just before I start, I'd like to
19 support the one comment that -- about the inferred data
20 and give an example in inferred data, that some
21 inferred data wouldn't be appropriate. I mean, if I --
22 if I collect a lot of data from which I infer
23 information which is highly probabilistic, but I'm
24 using it as a model to determine the ultimate
25 profitability of a customer or their likelihood of

1 being interested in the product, and I find that as,
2 number one, not absolute, and number two, you know, a
3 proprietary model that would help my business, then
4 that's probably not an appropriate kind of a piece of
5 information to make accessible. So, I think inferred
6 information might have to be looked at separately.

7 What I was talking about with authentication
8 is, number one, I do think a lot of times when we talk
9 about authentication for access, and indeed we're also
10 talking about access and the right to correct as
11 opposed to challenge, in most cases I really get a
12 little upset when we say correct, like online, as
13 opposed to just challenge, but those two things
14 together make the authentication and the chance for
15 fraud even more, you know, vulnerable.

16 Like, for example, let's say I have collected
17 -- and so, number one, if I have some idea as to the
18 process by which you're going to be authenticating, and
19 it's a routine process, you do it all the time, what
20 piece of information, like the last transaction, and
21 then I use that to come on and access information and
22 then correct it, then I -- what I can do is I can go
23 ahead and impersonate you and do a transaction that I
24 did, okay, on your behalf, use that to identify myself,
25 and then change the address so you'll never find out,

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1 okay, which is a common source of fraud.

2 So, I would say that really rather than to try
3 to describe even casebook examples, just like we don't
4 try to in security, I'd strongly recommend that we
5 recognize this is an art that will change, because as
6 we start doing authentication, we'll find cases where
7 people will get savvy to it and find ways of social
8 engineering, and some of the things you didn't describe
9 at all in authentication might be I might want some
10 offline or let's say different channel form of
11 authentication, which is clearly some of the ways in
12 which we now handle fraud with credit cards. When people
13 receive a new credit card, we ask them in a different
14 channel to verify that they, indeed, did receive it.

15 So, I'd say that the problem with this, since
16 it's imperfect, we don't want to describe too much or
17 show too many case examples, because what's likely to
18 be good practice today could be, you know, really bad
19 tomorrow, and tomorrow could be next week when somebody
20 finds that out. If I find out a practice that you
21 mentioned with Amazon, I could have a field day, okay,
22 with that kind of practice, because we have had -- seen
23 people have field days with some of those kinds of
24 practices in more sensitive information.

25 Therefore, I also say we should give some pause

1 to -- thought as to challenging information is good,
2 okay, but necessarily coming in and just saying I'm
3 going to correct it, even if you think it's the -- your
4 own personal information, like your name and address
5 and phone number, don't let people do that too easily,
6 you know, without being able to challenge that. Oh,
7 you want to change the address? Fine, I'll take that
8 under advisement.

9 Then we go use that address, because I've been
10 sending mail to that address, and people have been
11 paying bills. So, let me go back to that address that
12 you say is no longer any good and first verify that it,
13 indeed, is -- that the occupant there isn't challenging
14 that that's really their address or really that
15 account. So -- if you're following what I'm saying.

16 So, I would suggest that we -- we acknowledge
17 the imperfectness, we talk about the need to be very
18 cautious about this, and we recognize the fact that
19 there's good practices and there's good practices that
20 are a moving target in the process that we'll improve
21 upon, and it won't really be perfect unless we someday
22 could imprint people with nonforgible, you know, IDs,
23 which none of us want, right, stamp us like cattle, and
24 therefore we know exactly who that person is and what
25 they are doing all the time, and I'll know it's you,

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1 but that's -- but that solution is, number one, not
2 perfect in itself, some kind of biometric, and number
3 two, it's not the kind of thing I think we'd like as a
4 solution.

5 MS. MULLIGAN: Can I just -- I think a lot of
6 the issues that you raised about access, correction and
7 amendment, which were the words that the authentication
8 group had come up with, actually are addressed on page
9 6. We did talk a lot about raising the barrier. If
10 you're actually talking about correcting something, we
11 actually used a Post Office example specifically tied
12 to credit card fraud, because I think we are very
13 cognizant of that issue.

14 I'm not as clear -- you know, I think I agree
15 with you that the -- that the case study, the examples,
16 need to be very -- more clearly noted as examples, but
17 I'm not sure if what I'm hearing from you is that there
18 is no value in examples, and if that's the case -- I
19 mean, I actually think that examples, particularly in
20 the authentication area, are really helpful, and I
21 would prefer to, you know, maybe work with you and
22 maybe Dan and some other people who have a lot of
23 experience in the authentication area to craft some
24 examples that you think would be perhaps less specific
25 but more -- but more useful moving forward rather than

1 can them altogether, but I'm not sure if you're saying
2 no, you really think we should junk them?

3 DR. SCHUTZER: Well, you know, as a suggestion,
4 what we might want to do is say give two extremes, you
5 know, one is give some secrets and then another is to
6 give something with some physical device, okay, or some
7 biometric as an example of stronger authentication, and
8 then, of course, that would be a perfect case to then
9 note the concern if we start drifting in that manner,
10 stronger identification being a lot better, but we're
11 also drifting into the dangerous ground of linking it
12 too much to identity, and we would have to do that
13 trade-off, all right, or something along those lines.
14 That may clearly be so.

15 If you're talking about some biometric, some
16 physical device that somebody has to have that there's
17 cost or something else involved in it, but it
18 definitely makes it a stronger kind of identification
19 of being sure of you being the right person if, indeed,
20 it hasn't been stolen and you haven't reported it
21 stolen and it's something physically you have to have.

22 MR. MEDINE: Rick?

23 MR. LANE: Just a couple things. First, I just
24 want to talk about the fundamental principles and --
25 I'm sorry, Rick Lane with U.S. Chamber -- fundamental

1 principles and access. I think there's a general
2 consensus around the room that access could be a
3 fundamental principle. I think what causes businesses
4 to pause is when you say fundamental principle, in a
5 lot of us, that means, Oh, my gosh, that means
6 fundamental regulation or fundamental legislation.
7 Because it is a fundamental principle, why not regulate
8 it or put it into regulation or why not make it
9 legislation? So, I think there can be an agreement
10 that this is a fundamental principle, but having said
11 that, there are different ways to implement that
12 fundamental principle.

13 On the authentication side, and I am in
14 agreement with what Frank was saying, especially the
15 e-sign example, where he was saying that electronic
16 signatures are going to be used as part of an
17 authentication mechanism, but even in that legislation,
18 we were -- we made clear, because of some of the
19 consumer concerns, that even if you sign something
20 electronically, there is still the ability to contest
21 that signature in a court of law, because there is a
22 possibility, no matter how secure you think it is at
23 one point, that it may not become secure, so you're
24 always able to challenge that with the knowledge that,
25 again, it's not a perfect system.

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1 So, even though authentication and using that
2 is making it easier for consumers to access and do
3 business online, we also have those back protections in
4 there, as well, and so if you try to make it -- that as
5 a standard or that as a -- as a legislative effort,
6 that could still cause problems, understanding the
7 technical problems that could exist in the future.

8 MR. MEDINE: So, again, how would you apply
9 that in this particular context? Would you -- on
10 authentication? Would you basically require that this
11 is -- businesses use reasonable methods of
12 authentication or how would you translate --

13 MR. LANE: Well, I wouldn't require businesses
14 to do anything.

15 MR. MEDINE: Excepting self-regulation.

16 MR. LANE: But I think best practices --

17 MR. MEDINE: I didn't mean to lead you down
18 that path, but what would be a good business practice
19 in this area?

20 MR. LANE: Again, I think the reasonableness
21 standpoint -- I understand there are loopholes when you
22 say "reasonable," but because as we've heard there are
23 so many challenges even with the examples that we
24 listed, which we thought were pretty good examples,
25 but there are a whole host of other examples

1 which could exist. So, you need a little bit of
2 leeway.

3 You can't say here, this is how things need to be
4 done. If you have it that narrow and straight, you
5 really may cause more harm than good. So, you know,
6 having a reasonableness standard of allowing some
7 flexibility there I think is probably the best way to
8 protect both sides on this -- in this debate.

9 MR. MEDINE: Dan Jaye?

10 MR. JAYE: Daniel Jaye, Engage.

11 On authentication, I think one interesting way
12 to look at this is to look at how authentication
13 affects degree of access. Up to now we have had a lot
14 of discussion particularly around nonaccount-based
15 data, about sort of the black or white decision, access
16 or no access, and I think actually in the document,
17 when they talk about the options with regard to
18 authentication of nonaccount-based data, one
19 interesting way of looking at this is the fact that you
20 could have different levels of access based on the
21 authentication capabilities.

22 It seems counter-intuitive to say this, but the
23 first level, the lowest level of access might, in fact,
24 be deletion and not read, and, in fact, if you look at
25 many implementations of clickstream collection on the

1 web today, you know, one might argue that today delete
2 access is provided. There is an ability for a consumer
3 to opt out of the association of a unique ID with
4 clickstream collection that at that point no longer
5 ties that back to that individual.

6 So, I think that once again, there is a -- I
7 think that may be a different way of looking at this
8 problem that may cause one of the controversial
9 categories to sort of come into the, you know,
10 100,000-foot level view of compliance with the access
11 principle.

12 MS. MULLIGAN: So, can I just --

13 MR. MEDINE: This is an important -- this
14 raises sort of the opposite concern of deletion, which
15 is what about the malicious deletion, which someone
16 else is deleting your data which may hinder your
17 getting access or benefits to other things? Deletion
18 is simple, but the question is how do you authenticate,
19 even there, that it's the subject who's deleting it and
20 not somebody else?

21 MR. JAYE: It's absolutely a compromise. I
22 just think that when you stack up the relative benefits
23 of allowing a consumer who has concerns about the fact
24 that decisions are being made about them with the
25 potential that a consumer may not get relevant ads and

1 offers because somebody else has disassociated the
2 information or deleted it, I think that when you stack
3 that up, you may -- you come out with the solution that
4 talks about deletion as the basic level of access.

5 MR. MEDINE: Okay.

6 MS. MULLIGAN: Could I just -- I -- you know, I
7 am very pleased to hear somebody kind of drilling down.
8 This is actually on page 10 and 11 of the document, and
9 it's talking about means of authentication for
10 providing access to things that are nonaccount data,
11 and we've put out a set of options, you know, ranging
12 from present the cookie, which I think many of us felt
13 was not satisfactory, to things that while they don't
14 really promote access we thought protected privacy in
15 another way, such as requiring the deletion of the
16 data.

17 I really would like to hear other people's
18 thoughts on this particular issue, because I think it
19 is one of the thornier ones, and I'm very heartened to
20 here Dan step up to the plate, that he thinks there is
21 something in here that is of -- while it may address
22 access, there are also privacy issues, and I think it
23 is something that might be useful, and I would love to
24 hear other people's comments on this section.

25 MR. JAYE: Just to respond, part of the point

1 I'm making is that it is access, but it's a specific
2 subcategory of access called deletion, you know, of the
3 three major subcategories, access, update and delete.

4 MS. MULLIGAN: But it's usually view and
5 delete. This is skipping -- I mean, point taken.

6 MR. MEDINE: Any questions on that in a limited
7 sense more protective --

8 MS. MULLIGAN: Right, if I could ask people on
9 behalf of the authentication group if other people
10 would just kind of focus on this for a second, because
11 Dan kicked this off so nicely, so it would be great if
12 we had a sense of where the committee is going on that
13 issue.

14 MR. GAVIS: Alex Gavis. No, I'm sorry, the
15 pages were -- were very difficult to figure out, the
16 pagination on this.

17 The point I wanted to make was simply that it
18 seems as though there's a continuum of authentication
19 here, sort of that one end of the spectrum is very sort
20 of light authentication, on the other end biometrics,
21 and I just wanted to make the point that I think what's
22 very important is that companies actually monitor and
23 assess the risks sort of along the way, which I guess
24 is what Dan was saying earlier, and then it may not be
25 necessarily that there's a continuum and that it's so

1 simple to lay out a continuum like that, because
2 ultimately, as a company creates an authentication
3 system, it may actually mix and match and change things
4 along the way and change them relatively quickly if it
5 finds that there's a problem or that there's an issue
6 that's arising time after time.

7 And so I think it's -- the examples may be a
8 little too simplistic. I think we want to make sure
9 that there's an element of complexity that gets layered
10 in that says that these may actually wind up being
11 combined in certain cases.

12 MR. MEDINE: Rob?

13 MR. GOLDMAN: Rob Goldman, Dash.com.

14 I think the solution that Dan proposes for
15 authentication, in the case of clickstream information,
16 is an interesting one, especially when it is not, in
17 fact, personally identifiable but machine identifiable,
18 and it's not necessarily an ideal solution for other
19 kinds of data in other situations, so it's a very
20 specific implementation that's useful in that case, and
21 I think that it's a difficult -- they're all different
22 trade-offs to make, of course, and I guess this -- I
23 don't want to drag us back to fundamental principles,
24 but I think they are very related, so I am going to
25 make a comment there, because I think it has clear

1 implications here.

2 I believe access is a fundamental principle but
3 not an absolute principle, and I believe that there's a
4 difference between -- or there's a continuum of
5 fundamental principles. Certainly some relate
6 specifically to information and online information and
7 others relate to business online. So, there are
8 principles the businesses have defended and need to
9 deal with in their making decisions every day,
10 principles like competitive differentiation and
11 relative advantage and trade secrets and the like.

12 When those principles come into conflict, it's
13 difficult often to come to a clear decision as to which
14 ones should -- should dominate in any given case, and I
15 think that obviously authentication is one of those
16 where it's very imperfect and often you'll find these
17 fundamental principles clashing against each other.
18 So, I think in the case of derived data with regard to
19 access, it's a thorny issue.

20 Dash provides access to clickstream
21 information. We also allow for challenging of
22 clickstream information at a domain level, but we have
23 gone to great lengths to try to provide access to users
24 of that type of information. Derived information is a
25 little thornier, because we have proprietary algorithms

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1 that we're trying to defend. Of course, we want to
2 provide access to the -- to the output of those
3 algorithms, because it's in our best interest to do so,
4 but we have to guard against adverse selection, because
5 the people most likely to use that access will be the
6 ones who will be most damaging for Dash, our
7 competitors. So, we need to do the best we can to
8 trade off against that.

9 So, I share Dan's fear of the dogmatic
10 expression and implementation of anything when all of
11 these principles come into conflict with each other.
12 So, I guess in the final analysis maybe a word like
13 "reasonable" is the best way to deal with something
14 like authentication, but we can't hope to in any
15 document entirely enumerate all of the various
16 conflicts of the various principles, and it would be
17 useful if there was one absolute principle that
18 overwhelmed the others, but I think it's too
19 complicated a space, and it gets more and more
20 complicated as we go.

21 So, we have identified that the case studies
22 that may be useful now won't be useful later as things
23 evolve, and just the technology that underlies this is
24 evolving so quickly, some of these principles might
25 shift and change under our feet.

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1 So, I guess I have no -- I wish I had sort of
2 the answer to all of it, but the frustrating thing is
3 that every time I think we get close to something, we
4 realize that there are five or ten principles in
5 conflict just right under our feet, and the answer
6 we've come to for in this case access to nonpersonally
7 identifiable clickstream information just doesn't work
8 when you're talking about health information or other
9 types.

10 So, maybe just guarding against those conflicts
11 by using qualifying language is the best course, at
12 least for now.

13 MR. MEDINE: It sounds like to some extent
14 there is a range of authentication that may parallel to
15 some extent the discussion in the early access piece of
16 the range of access, depending on the benefits and
17 costs of access, as well.

18 Dan?

19 DR. SCHUTZER: Yeah, just to react to the
20 delete, I was sort of thinking about it, you know, when
21 you said you don't have to be as cautious about
22 deleting, because I was reacting to applications I was
23 familiar with, and so, Gee, delete, you know, request
24 for credit or accounts, you know, shudder, right? And
25 then I said, Oh, well, he's talking about click data,

1 so I guess -- I think what we're talking about here is
2 so application-specific, and that application, of
3 course, may change.

4 So, I mean, even things like click data, let me
5 illustrate why that might be something I might shudder
6 about, too. Supposing that I was using the clickstream
7 data to really better understand whether my PC had been
8 used by others, you know, not just my own self, or had
9 been compromised, you know, by some hacker, the first
10 thing a hacker will try to do when they compromise is
11 to re -- to erase the logs, to erase any trace that
12 they had been there. I'd like to keep those logs to
13 see if they have been there or what they have done or
14 that my little son or daughter went in and actually
15 clicked around places under my name and password that I
16 would just prefer to not go to.

17 It would be a useful tool that I might want to
18 have, you know, some strong authentication preventing
19 somebody from deleting, which is one reason why I'd
20 rather couch the whole authentication issue and the
21 correction in the same way in which we've couched the
22 security in the following sense:

23 I mean, to ask somebody who's a security
24 expert, if I'm going to try to devise some new security
25 algorithm or system and I go and build it and I give it

1 as much careful thought as I could, I'm an expert in
2 that area, I still can't be sure, until it's faced the
3 test of time, that there isn't somebody or some group
4 of people smarter who have been able to penetrate some
5 holes in my implementation.

6 So, a lot of us security people are very
7 cautious when we first see an algorithm or
8 implementation of an algorithm that's been around for a
9 while, has been tested, people have -- ethical hackers
10 and the like haven't been able to find a way to break
11 it, and that's the only concern I have when we start
12 talking about case examples, that as bright as we think
13 we are, we are going to come up with some examples and
14 find that, A, it's either -- it seemed good at the
15 time, but it really turned out to be easy for some more
16 clever people to penetrate, and it seemed like it was
17 pretty harmless to allow somebody to correct this data
18 or provide some deletions, but it eliminated a whole
19 host of other kinds of things that were really
20 important to protect.

21 So, I -- you know, I'd rather opt more for the
22 reasonable and the continuum and the process kind of a
23 thing, the same kind of words we used in the security
24 section, words like that that say, Of course we want to
25 give access to information, of course we want to be

1 able to protect that by authentication, and we'll do
2 reasonable things, okay, and what seems reasonable
3 today may be different tomorrow, both because
4 technology makes it possible to get better, stronger
5 authentication more cheaply in the hands of people and
6 because we've -- the world's moved on, you know, what
7 looked like it was a very good scheme at one point is
8 no longer a good scheme, because people have engineered
9 ways around it.

10 MR. MEDINE: Ted and then Andrew?

11 MR. WHAM: Ted Wham.

12 To address the question that I think you
13 brought up or put forth in terms of feedback on this, I
14 think that adding deletion as an additional level along
15 the par of view, edit and challenge might make a lot of
16 sense. I think specific applications such as the
17 one Dan brought forth are very useful. Obviously you can
18 have authentication considerations and certain business
19 models where that doesn't fit, but I would suspect that
20 there's a lot of unanimity within that delete that, you
21 know, you don't use all the time, just on ones it fits.

22 As a tangential point to that, and it fits to
23 other portions of the text within that, deletion per se
24 causes a little bit of concern for me versus disabling,
25 because deletion would imply to me it's deleted from

1 all backup tapes, all offline storage and so forth, and
2 that is very problematical to implement on a company
3 basis because of automatic processing and so forth to
4 back it up. It raises a question which I'd like to
5 kind of, you know, percolate up to the group here.

6 Someone can come, for instance, to Excite.com
7 and disable their account at any point. We will take
8 it out of the active databases, you won't be able to
9 log in and use that, but that information is still
10 sitting on some backup tape or probably scores of
11 backup tapes, quite honestly, and it's discoverable in
12 a legal process, right? So, is disabling a sufficient
13 level of control or is, in fact, deleting something
14 that's required?

15 MR. MEDINE: Andrew?

16 MR. SHEN: Just continuing the flow of kind of
17 the conversation here, more on deletion, in some ways I
18 think some of the examples that Dan brought up in
19 situations where you might want to prevent deletion of
20 clickstream data, some of them are very valid. You
21 don't want to have consumers be able to certainly
22 delete records of a product they bought if they did,
23 indeed, order it. I mean, that's sort of common sense.

24 But I think a lot of situations he brought up
25 are really kind of very minor ones, because they really

1 don't go to why that company collected that information
2 in the first place. Companies don't collect that
3 information and all this log data to make sure that
4 they aren't getting hacked at. That may be one of the
5 benefits, but that's not really the primary reason why
6 a lot of the companies around this table are collecting
7 all of this clickstream data.

8 To the point that Ted just brought up about the
9 various records you have, digital tapes, backups, in
10 some ways I'm starting to feel like Frank, I'm starting
11 to have more worries about my privacy. There are so
12 many copies out there, there is no way you could
13 possibly expunge it from your records. The more copies
14 you have out there, the more possibility it could get
15 to where it shouldn't be.

16 I think sort of in the shuffle, and this has
17 been discussed, Fair Information Practices has many
18 iterations, as Ron mentioned, and in all its different
19 versions, something that sometimes gets left out is
20 kind of a -- something you have to think about even
21 before you start thinking about Fair Information
22 Practices. Should a company be collecting this
23 information? Is this necessary for that business to
24 conduct business? And I think that's something that
25 should be brought forth. In some ways deletion helps

1 support that point.

2 MR. MEDINE: Stewart?

3 MR. BAKER: You know, there's a point that I
4 don't see being discussed here that I think is a
5 significant one that we need to address, and that's the
6 risks of liability that companies face when -- when
7 asked to provide this information. We've talked about
8 the pretext requests and the risks that important
9 information will be released just because you haven't
10 asked for a third piece of ID. There's sort of
11 significant risk that that will result in liability for
12 the company that has provided the information that
13 turned out to go to the wrong person.

14 I don't see that addressed. I think it needs
15 to be addressed very clearly that companies should not
16 be liable if they have undertaken reasonable efforts to
17 make sure that the information doesn't fall into the
18 wrong hands, and at the same time, if they have a good
19 faith belief that a particular measure is necessary to
20 prevent information from falling into the wrong hands,
21 they ought not to be held to have violated those
22 principles. It seems to me that otherwise you have a
23 kind of damned if you do, damned if you don't result.

24 MR. MEDINE: Jerry?

25 MR. CERASALE: Yeah, I wanted to -- this is

1 Jerry Cerasale.

2 I can't find in here right now, Deirdre, where
3 at least we had a liability discussion --

4 MR. LANE: It's F.

5 MS. MULLIGAN: We had a whole section. It's F.

6 MR. BAKER: I didn't see it in the
7 authentication section.

8 MS. MULLIGAN: The problem is that has been
9 folded in, but it is here, and there's a fair amount --
10 I think almost verbatim what you just said.

11 MS. SWIFT: It's page 30.

12 MS. MULLIGAN: The page numbers are rather
13 screwy, so if you count from the back, it's the third
14 page from the back.

15 MR. LANE: It's after E.

16 MS. MULLIGAN: Third physical page.

17 MR. CERASALE: Yes, there we are. There is
18 some discussion there anyway, Stewart, we didn't
19 totally forget that, so --

20 MR. BAKER: Why don't I make a comment when I
21 actually have something intelligent to say.

22 MS. MULLIGAN: I think this needs to be tied
23 into the security section in part, because I think it's
24 part of that broader discussion.

25 MR. MEDINE: Right, okay.

1 MR. CERASALE: I originally put it up to
2 respond to Ted, and David, you can help me, because I
3 have senior moments every once in a while, but if my
4 memory is correct, when we worked on the Children's
5 Online Privacy Protection Act and talked about
6 deletion, what we were talking about is not being able
7 to be retrievable, and so I think that maybe we have to
8 try and get that type of a thought in here if, in fact,
9 we keep deletion in there, that it's get it out of the
10 ability of the company to specifically go in and
11 retrieve that information, Stewart, through its active
12 processes.

13 MR. WHAM: Just be really careful, because if
14 it's on tape, you can get it.

15 MR. MEDINE: I think there is also a Fair
16 Credit Reporting analog here, as well, which there is a
17 seven-year obsolescence provision in the Fair Credit
18 Reporting Act, which doesn't require deletion of data
19 but simply means it can't be reported out. It doesn't
20 have to be deleted from the credit bureau's database.

21 MS. MULLIGAN: We also offer an option of
22 disassociate, which is closer, I think, but we also
23 provided a deletion option, which does provide
24 different levels of protection.

25 MR. MEDINE: Let me just counsel from the FTC

1 point of view that you want to be sure how you
2 communicate to consumers what's going on, because if
3 consumers think it's deleted and, in fact, it's simply
4 disassociated or disabled, consumers may be operating
5 under a different impression, and, of course, at the
6 extreme you might risk Section 5 issues, deception, in
7 terms of how you communicate the information to
8 consumers.

9 I think clearly you have to communicate to
10 consumers what it is that's happening, it's critical,
11 and that's not to push you one way or the other but to
12 make it clear that there is a -- there may well be from
13 a consumer's perspective a very -- a feeling it's off
14 the database versus not being used or versus not being
15 able to be used. There's a whole range of
16 possibilities.

17 MR. WHAM: I guess the whole point I wanted to
18 bring up and was springing up as a point of discussion
19 is disabling it is probably pretty common. Even
20 companies that may represent themselves as deleting it
21 are disabling it, because there are, you know, --
22 sorry, Andrew, but data kind of filters into all sorts
23 of little backup tapes, and Frank is not here, too bad,
24 but I think he ran out with his hair on fire.

25 The question I have is from a public policy

1 standpoint, you know, if the FBI comes in with a
2 warrant, we will go get that data, right? And it is
3 technically possible to get rid of that data, it's just
4 a nightmare to do it. If you want to really get rid of
5 it, you can do it, but wow, you're looking at huge
6 expense. So, does that create something we want to
7 discuss and how we're going to deal with it in the
8 context of the report?

9 MR. GOLDMAN: Can I just quickly interject? It
10 was -- I totally agree with Ted, it is a nightmare to
11 do, but it is doable, and we looked at it carefully,
12 but we didn't want to represent ourselves as having
13 deleted information and then find ourselves in a
14 situation where we were subpoenaed for it and there it
15 was. So, the solution we came to, and if you can
16 imagine the volume of information we collect, a
17 staggering volume of information, is that we do an
18 entire complete system backup twice a week and recycle
19 the tapes, so that by the end of the week it's gone
20 from any backup all the way across.

21 It is an operational challenge to do it that
22 way, and I don't know that larger organizations with
23 distributed data can -- could do it nearly as well, but
24 there certainly are options.

25 MR. MEDINE: Richard?

1 MR. PURCELL: Finally, thank you. A lot of the
2 points I was going to make have just been made. I just
3 want to summarize something here and then provide an
4 example.

5 First of all, it's incredibly important that we
6 understand David's comments about the way we
7 communicate how data is handled here, and I think it's
8 naive even to say that he's not putting pressure on us.
9 This is -- there is a responsibility and a legal
10 liability to say exactly what you're doing in precise
11 and unambiguous terms. So, if you can delete data,
12 delete data and say that. If you disable or deactivate
13 data, say that. If you disassociate data, say that.

14 Also, our good friend Richard Smith about a
15 year ago pointed out a data collection practice at
16 Microsoft that he regarded as being, you know,
17 irrelevant to a purpose or unknown to a -- to a user if
18 a purpose existed. We actually did have the
19 opportunity to go through this exercise of deleting
20 data. A best practice for a nonregulated industry, I
21 can't apply this to the financial industry, is to have
22 rolling backup.

23 In other words, you keep a tape of every week
24 for about a six-week period, and so in the seventh week
25 you erase or you overwrite that last tape, and you roll

1 it around. In essence, if you delete data in week one
2 from your live system, by week seven, that is virtually
3 and physically deleted, but you do have to say it.
4 That's essentially the process you go by.

5 We went through that process, and we said it's
6 not good enough in that case to wait for that rolling
7 backup to clean out that six-week period of time. We
8 went to each and every one of those backups and deleted
9 the tapes -- and deleted the information in an explicit
10 and rather aggressive manner.

11 I can't trivialize this, because it is
12 difficult work, but it's not undoable by any means. It
13 simply means you change your processes, you put up
14 some, you know, some special considerations, and you
15 essentially tell people, Sorry, dude, it's your job, we
16 have to do it, go do it, get it done by this date, and
17 it happens. People walk into data centers, they mount
18 tapes, they go find the right start place, and they
19 delete as is appropriate from that point.

20 So, be sure that you say what it is you're
21 doing and describe it distinctly and then also make
22 sure your processes support what you're doing and it
23 can be done.

24 Andrew's point about how much data gets out
25 there and how far it goes, that's another point we have

1 to talk -- we have to be very conscientious about. If
2 you keep data for -- in a manner, if you're a pack rat,
3 if you're a data pack rat and you just keep data and
4 you don't know why you keep it and it just is there and
5 it does filter out in all these ways, that's
6 nontrivial. You should know about that, and you should
7 have control processes around that.

8 This is -- this is not stuff we can just say
9 kind of just happens. It doesn't happen. You have
10 control processes that can -- that manage this stuff,
11 and if you don't, then it's an irresponsible act.

12 MR. MEDINE: Why don't we take two more
13 comments and then take a break so we have time to go
14 into the other parts of the access discussion this
15 morning.

16 Rick and Tom, your final comments?

17 MR. LANE: Rick Lane, U.S. Chamber.

18 I think Richard is right on point, is that it
19 really comes down to notice of how that information is
20 going to be used, how it's going to either be deleted
21 or, you know, the other functions that are out there in
22 terms of disassociating data, because even though you
23 may say I delete and I back up my tapes, if it's
24 already been given to third parties, and you read the
25 privacy statement, and it says third parties have this

1 information, you may delete it from your system, but
2 it's not necessarily deleted.

3 Again, you have to make sure that people
4 understand that. I just think it's important to have
5 clarification, but to mandate deletion in all cases
6 could cause a problem. So, I think, again, it gets
7 right back to the notice issue of how that information
8 can be disassociated, deleted and so forth.

9 MR. MEDINE: Tom?

10 MR. WADLOW: Well, I just wanted to throw in a
11 -- something I think probably is going to be probably
12 more of a technical note here, but, in fact, I would
13 claim that the days in which you claim that data could
14 be able to be deleted, if are not passed already, will
15 be passed very soon. There is just simply too many
16 ways in which data will be around.

17 You know, you talk about mounting backup tapes
18 and things like that. Disk gets cheaper every year.
19 The data will spread for legitimate reasons as well as
20 nonlegitimate ones. People will make copies of it for
21 working things, you know, test data within programs and
22 things like that, and the -- the motion of the
23 industry, the motion of the state of the art is toward,
24 whether you like it or not, simply the fact that once a
25 -- once a bit is set, it will remain set, and you can

1 never really get rid of all the copies of that bit.

2 MR. MEDINE: Okay, why don't we take a
3 15-minute break, reconvene about 10:35 and move into
4 the access one subgroup. Thanks.

5 (A brief recess was taken.)

6 MR. MEDINE: Okay, could we start, please?
7 Take your seats. I'll be like the House, take your
8 conversations outside the chamber.

9 Why don't we turn to the first access group,
10 and the draft report puts forward three models for
11 determining when access is appropriate, the default
12 rule, the total access rule and the case-by-case
13 approach, and maybe to start the discussion off someone
14 from that group would like to maybe walk us through
15 what those are so we can get a better understanding of
16 that.

17 Jane is volunteering for that.

18 MS. SWIFT: Let me just walk you through partly
19 what they are, although I hope most of you have had an
20 opportunity to read most of them and also a little bit
21 behind the scenes of what the thought process was in
22 developing these three separate approaches.

23 The total access rule is pretty much what it
24 sounds like. It assumes, with very limited exceptions,
25 that any information that is -- that broad categories

1 of information that are collected about you that
2 should, in fact, be -- that consumers should be
3 entitled access to.

4 The second approach is the default rule
5 approach, which also operates from the assumption that
6 consumers have a right to the information that's being
7 collected about them, although it represents, at least
8 we believe, a little more narrow definition about what
9 information is that you should have access to, as well
10 as some more extensive -- extensive limitations to that
11 information based on getting a little bit more into the
12 cost-benefit approach.

13 The case-by-case approach is -- was really an
14 attempt, based on a lot of the conversation around
15 here, to find some approach that tried to build in the
16 variety of issues that have been discussed around the
17 table, sensitivity of information, how different
18 individuals feel about the sensitivity of different
19 information, the use of information, the practicality
20 of collecting information, and to sort of get some
21 model whereby the variety of viewpoints expressed
22 around this table, as well as in the public at large,
23 could be utilized in an approach for access.

24 Without going much more into each of those
25 three approaches, let me just make three additional

1 points, and then if Steven Cole wants to talk a little
2 bit more about the default rule, I'll give him an
3 opportunity.

4 First and foremost, I hope everyone will
5 recognize that this was largely sort of a 50,000-foot
6 endeavor to look at in a very broad context three
7 approaches that run the range of the sentiments along
8 this table. It was not intended to be a 10,000-foot,
9 drill down to the detail level approach, which leads
10 into my second point, which is support for any one of
11 these approaches by any of the constituency groups
12 represented here will really depend on three issues.

13 Number one will be what the 10,000-foot
14 implementation is of an -- whether it's in
15 case-by-case, default rule or total access, what the
16 details become. Secondly, what the correlation of
17 those approaches would be to the other Fair Information
18 Practices, what -- how it relates to notice, how it
19 relates to consent. And lastly, and I do this with
20 some trepidation, what the enforcement mechanism for
21 each of these approaches will, in fact, determine, in
22 addition to what the details are and what the
23 correlation as to Fair Information Practices, what the
24 comfort level is of a variety of different viewpoints
25 around this table with each of these approaches.

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1 And lastly, just to throw another issue on the
2 table, in even a broad, sort of high-level view of each
3 of these approaches, these approaches do reflect --
4 each approach reflects the differing opinion of members
5 of this commission and of our subcommittee of what the
6 reason is for access. The total access approach does
7 derive partly, and maybe largely, although I'll let
8 others comment on that, from the belief that one of the
9 purposes of access is to provide consumer awareness.
10 The default rule approach and the case-by-case approach
11 may also have elements of consumer awareness but are
12 more geared toward the belief that access is based on a
13 need to provide accuracy of information.

14 So, we tried to establish three very different
15 approaches. They are very broad definitions of
16 approaches to just start a framework for how you could
17 talk about accessing information, and we also discussed
18 a little bit about what different types of information
19 then are to bear in those approaches.

20 MR. MEDINE: Steve, do you want to add to that?

21 MR. COLE: Okay, Jane thought it might be
22 helpful if we just spent a few minutes describing what
23 the subcommittee called the default rule. It's not a
24 name that was used in any of our materials. This was
25 modeled after the approach that is used in the BBB

1 Online Seal program.

2 Before I discuss the substance of the approach,
3 in my view, the approach has two procedural aspects to
4 it that make it kind of an interesting model.

5 One, it was developed by 27 companies who are
6 engaging in e-commerce in all facets, consumer product,
7 financial services, you name it, and so somebody at one
8 time thought at least for the purposes of a seal
9 program it was reasonable or many bodies did, many
10 of you around the table, in fact.

11 The second procedural aspect of it that to my
12 mind makes it interesting is it's very similar to and
13 in our belief very compatible with the safe harbor
14 approach that was negotiated by the Department of
15 Commerce and the European Union, and that I think
16 reinforces, at least to some of us, the attractiveness
17 of it.

18 The approach was offered in reaction to two
19 things during our last meeting and prior to that. One
20 was a discussion at the last meeting led by Deirdre and
21 others suggesting that access should be afforded unless
22 there was a reason not to. It was basically a simple
23 premise. And the second reason that we made this
24 recommendation was a concern that some had, I certainly
25 did, that the options that were previously on the table

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1 from our committee may be too complex, may have been
2 too complex.

3 They required a looking at, in every single
4 case, how the data was going to be used, the type of
5 the data that we were talking about, the purpose that
6 the requester had in seeking access, and because this
7 was an analysis that on the one hand seems very
8 reasonable, that you want to know all this information,
9 many of us felt it would be very burdensome and costly
10 to do -- and unnecessary to do in every single case.

11 I know I recall David's admonition that maybe
12 this advisory committee would provide some guidance to
13 webmasters, and I think that I personally added to
14 that, and maybe we could provide guidance to others who
15 were trying to enforce these kind of principles, but
16 having said that -- I wasn't referring to the
17 Government there -- the approach is simple, as Jane
18 says, at the tree top level.

19 It refers to personally identifiable
20 information that's collected online from an individual
21 or is merged with other information obtained from other
22 sources or from the individual offline. It does not
23 refer to information that is not retrievable by the
24 business in the ordinary course of business. We have
25 some definitions of how you decide that, and the basic

1 rule is that data should be accessible upon request,
2 proper authentication and all that, unless it would
3 create an unreasonable burden to provide the access.

4 There was a lot of I'll use the term
5 legislative history to the term "unreasonable burden."
6 The example that was on the table was the undue burden
7 requirement of the Americans with Disabilities Act, and
8 essentially, as we understood that, there was a bias in
9 favor of making an accommodation unless it really would
10 be very, very burdensome for the business to do that.

11 So, this was the thought of the BBB Online
12 steering group, that you would provide access unless it
13 was very, very burdensome, and it's in that
14 decision-making process that a company would do some of
15 the balancing that might have been necessary in a
16 routine manner in all the other cases. There you might
17 look at the need for the data, the sensitivity of the
18 data, the cost to the company in setting up systems to
19 put -- to respond to this kind of request and that kind
20 of thing.

21 There were some comments during the last few
22 days from members of the advisory committee that were
23 very well taken, and I just want to say one or two
24 comments about them. Remember that this approach was
25 borrowed from another purpose, the operation of a seal

1 program, and remembering what I know you talked about
2 this morning for a while -- I wasn't here for that, but
3 I have been like a broken record raising this point at
4 every meeting -- there is not a crisp focus about what
5 this report is exactly for.

6 The reason I bring that up is there may be
7 aspects of this approach that may make a thousand
8 percent sense in the context of the seal program, and
9 it may be needing to be -- even if everyone likes it,
10 it still needs to be tweaked and improved for this
11 purpose, and that's very possible. Two very easy
12 examples were we excluded from the definition of
13 "personally identifiable information" information
14 that's not retrievable in the ordinary course of
15 business, and I don't recall if it was Dan or somebody
16 made the comment, well, it still may be personally
17 identifiable information even if it's hard to retrieve.

18 Well, that's right, and we should clear
19 something like that up. That was just a technique for
20 saying it wasn't going to be accessible in our program,
21 and we just used that technique to exclude it from the
22 definition, sort of a legislative drafting technique.

23 And the other comment that's an example of the
24 hard look that we ought to give to particular
25 provisions was we have an allowable charge for access

1 of \$15, and the comment is correctly made, well, maybe
2 \$15 isn't the right amount, maybe next Wednesday it
3 won't be the right amount even if it was the right
4 amount today, and there's probably a more general
5 principle at stake here, which is it should be -- I
6 don't know that people would agree with this, but what
7 we saw the \$15 is as an amount that might deter some
8 frivolous requests but was not intended to recapture
9 company costs, and we understood it wasn't going to do
10 that, and that's all it was going to serve.

11 So, that's an overview, and certainly there
12 might be a lot of good questions.

13 MR. MEDINE: Before we get into the discussion,
14 it might be helpful for Jane or Steve or others to
15 explain the difference between the default rule and the
16 case-by-case rule. Is it a different process of
17 analysis? Does it necessarily lead to different
18 results? How can one compare those two options?

19 MS. SWIFT: I think it is a different process,
20 but again, depending on the implementation method and
21 the sort of details that you come up with, they could
22 end up with -- in a particular request for access
23 coming to the same result. It's just the method of how
24 you get there.

25 I think the biggest difference is the

1 presumption, as Steven said, on the default rule
2 approach that there should be access to information and
3 then trying to carve out definitions of when there
4 would not be access that would trigger a variety of
5 different indications, versus building all those
6 considerations, use of the data, who the requester is,
7 what the purpose of that request, what the sensitivity
8 is, how you measure sensitivity, how you define
9 different kinds of data, all being in the first
10 instance put into an equation.

11 I guess the simplest way is almost from a
12 modeling standpoint in our minds, which is you start
13 with the default rule, with assuming that most things
14 are available, and you start to whittle down to get an
15 exception, whereas you start with the case-by-case with
16 no assumptions but a lot of different criteria to
17 measure against and try and find some formula or
18 mechanism by which each piece gets measured in some
19 sort of spectrum or map type measurement that I am
20 totally incapable of trying to describe, because I
21 don't have the right words, and I'd be making a hell of
22 a lot more money if I had taken those courses in
23 college.

24 MR. COLE: David, let me add just one more
25 thing to that, and again, it gets to the function of

1 what the recommendation would be for.

2 If we're talking about a self-regulation or
3 even a regulatory approach, what the committee called
4 the default rule I would suspect allocates burdens
5 here. If the presumption is in favor of access, unless
6 the entity that holds the data has a good reason not to
7 provide access, then the entity is going to have to
8 establish to somebody that they had a good reason.

9 In every single case, if you have to weigh and
10 balance this, it arguably could put more of a burden on
11 the person asking the request to establish -- making
12 the request to establish the need for it, but as Jane
13 says, we're at a tree top level, and not knowing how
14 it's going to be implemented, who's going to be
15 implementing it and what the details are, it's not very
16 easy to answer these questions on the distinctions.

17 MS. SWIFT: And I would just say that also
18 there is another important point, which is the
19 case-by-case method has a great deal of attractiveness
20 in its ability to take into consideration and weigh a
21 variety of different viewpoints, a variety of different
22 issues, as we have in this commission. That very
23 strength is its greatest weakness, because by weighing
24 all of those, it becomes extremely complex, and that
25 complexity in and of itself might make the 10,000-foot,

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1 sort of the street-level agreement, very difficult to
2 get, but also, even if you could get there and get a
3 variety of different constituency groups to agree on
4 that, knowing what the implementation was, you may come
5 up with a system that is so complex as to be
6 unworkable.

7 MR. MEDINE: Fred?

8 MR. CATE: Thank you, Fred Cate.

9 I wanted to make comments just about the
10 introductory part of the access section and also about
11 the default rule approach, and the first is about the
12 introductory section. I just think we need to be
13 explicit, particularly in light of the conversation
14 earlier this morning, that to some extent that
15 introductory paragraph or paragraphs need reworking to
16 reflect I think that broader discussion this morning.

17 We jump right into reasonable access. It's the
18 term used in the first sentence. We, of course, don't
19 say what is reasonable access or what makes access
20 reasonable. It strikes me that we just need to be a
21 little bit more explicit. I'm not disagreeing
22 substantively with anything here but rather am saying
23 that access, in order to have these benefits, must be
24 reasonable.

25 Then what the rest of this section is looking

1 at are the types of conditions under which access would
2 be reasonable. Unreasonable access would presumably
3 not be something that we would write about in these
4 sort of warm and glowing terms.

5 The other comment about just the first
6 paragraph is it presents reasonable access as entirely
7 positive until the fourth sentence, where it says,
8 "However, the manner in which this access is provided
9 and to what degree it raises these complex questions,"
10 and I think in light of the discussion this morning,
11 there was certainly some tension that even reasonable
12 access is in tension with other values, whether
13 related to privacy or related to other things, and that
14 this introduction should reflect that, that even with
15 reasonable, there are other issues at stake.

16 That's exactly why, then, it takes pages more
17 to describe what would make reasonable access and what
18 should happen once we find it is reasonable.

19 Under the -- under the default rule approach,
20 the only comment there is just that we seem to be
21 moving in between these two sort of levels of
22 abstraction, that at some levels it's very broad, the
23 50,000-foot approach, and at some levels it's very
24 specific, like \$15, and I find that extremely
25 confusing, and I think it will be even more confusing

1 to a reader that hasn't participated in this
2 discussion.

3 Along the same lines, we have terms that we
4 don't clearly define. We say, "and this includes
5 prospect data," never say what that is, or as you
6 mentioned just a moment ago, Steve, we say, you know,
7 "information is not personally identifiable
8 information." Well -- because I don't think that's
9 what we really need to say. I think we need to say
10 that one of the things that goes into the balance is
11 whether access should be provided or whether that
12 access is reasonable and is it retrievable in the
13 ordinary course of business, and that we should say it
14 more in those terms if that's what we mean rather than
15 sort of go back and forth to say these specific
16 definitional concepts.

17 The last point related I think exactly to that,
18 100 percent I think we should give credit to BBB Online
19 if that's where much of this is taken from. I think it
20 is better to describe this as much as possible in our
21 own stand-alone vocabulary so that we don't bring into
22 it another organization, another organization's
23 documents, another organization's experience as ways of
24 interpreting this document, and to that end I guess the
25 more we can sort of eliminate long block quotes from

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1 another organization's addressing of these issues,
2 again, unless we think they've just got it exactly
3 right, I think that adds to the sense of going back and
4 forth between these kind of broad scope issues that
5 might be useful to the Commission or to somebody else
6 and these more specific, you know, here's the
7 definition of, you know, personal information.

8 MR. COLE: May I just say, Jane and I just had
9 this exact conversation, and I agree with you entirely,
10 that that would be a desirable thing to do. This is
11 just part of the drafting process and the speed with
12 which documents were put together. So, I think the
13 point is very well taken.

14 MS. SWIFT: And I would just say it was also in
15 an attempt to keep the report shorter rather than
16 longer, to sort of rewrite things to be able to
17 reference them, but it is really just a drafting
18 mechanism, whether you not -- whether you go through
19 and, you know, whether you give credit or not, say what
20 prospect information is, for example.

21 MR. MEDINE: Okay, and we certainly appreciate
22 the tremendous effort of drafting work that was done to
23 get to the point where we are right now.

24 Jonathan?

25 DR. JONATHAN SMITH: Jonathan Smith, University

1 of Pennsylvania.

2 One of the things I'd like to note here, and I
3 think it's important -- maybe you can say that it's not
4 important because I've got it wrong, but I think I've
5 got it right. I mean, one of the things that we really
6 haven't yet addressed is models where the consumer is
7 actually active, okay, and this is to follow up on a
8 point that Dan made earlier. I've mostly been lurking
9 this morning, listening to what's been going on, but I
10 want to react with this just because I think it could
11 inform the discussion.

12 You can have active efforts by consumers, for
13 example, the use of these pseudonyms, okay, and the,
14 you know, the issue here is -- what we're talking about
15 is kind of passive consumers and active companies,
16 okay, so the companies are doing everything, but
17 there's a different model where, for example, you could
18 have active consumers and active companies, where the
19 companies are trying to frustrate the consumers'
20 ability to use pseudonyms or the companies are saying,
21 Yeah, we can make it work even with pseudonyms, right?

22 I mean, that's part of what we were discussing
23 in one of the points that Dan brought up, and I think
24 that it's kind of important to think about roles here
25 and who's doing what. You know, so, for example,

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1 instead of telling companies what they must do, I mean,
2 one of the things that you could imagine is telling
3 them what they must not do.

4 So, for example, they must not interfere with
5 people's attempts to use pseudonyms, okay? So, for
6 example, that's -- that's also a different way to
7 reason about the same problem. So, that leaves people
8 free to invent their own approaches to managing their,
9 you know, Cybil-like 137 personalities, okay, but it
10 doesn't interfere with businesses' abilities to do
11 things that allow them to make their profits and
12 customize and all the other sorts of things that a lot
13 of the people around the table have talked about as
14 beneficial to the consumer.

15 You know, so, these kinds of things are things
16 that we haven't really talked much about that are kind
17 of really key to what could actually happen in the
18 future, and, you know, it seems to me that that's
19 something we should at least spend a little bit of time
20 focusing on.

21 MR. MEDINE: How do you see the active role
22 addressing the criteria that are set out in the report
23 currently, that is, the default, total access,
24 case-by-case? Do you see -- how do you see the active
25 role on the consumer's part setting the standard for

1 what kinds of information they get access to?

2 DR. JONATHAN SMITH: Well, I think the consumer
3 -- an active consumer might make a decision about what
4 kind of information they're willing to surrender and
5 not surrender. What kind of information they may be
6 willing to surrender as Daffy Duck may be far different
7 than the information they'd be willing to surrender as
8 Jonathan M. Smith, right?

9 I mean, that's really the issue, is that, you
10 know, to try to address -- I thought Ted made some very
11 good points about there being a continuum. Well, I
12 mean, you know, the continuum is in lots of directions,
13 and an active consumer can also make intelligent
14 decisions. I mean, assuming the -- you know, assuming
15 that the consumer is a dumb lump of clay I think is a
16 poor model. I'm being a little extreme, but, you know,
17 I think that part of the -- you know, part of the model
18 here is that there are intelligent people consuming,
19 too.

20 MR. MEDINE: Staying with our academics, Mary?

21 DR. CULNAN: Putting us with the dumb lump of
22 clay?

23 MR. CATE: That was his other choice for a
24 segue.

25 MR. MEDINE: Well, as a former one, I wouldn't

1 rise to that.

2 DR. CULNAN: Mary Culnan from Georgetown.

3 I want to talk to a couple of things that came
4 out as you were going over the total versus default,
5 because I think there are some -- there's more than one
6 issue lumped in there, and when you go from default to
7 total, it's not just sort of adding one, but you could
8 really look at a -- sort of a two-by-two table, which
9 no academic paper would be without.

10 The two dimensions are is the information
11 collected online from the individual, yes or no, and I
12 would say by no, then it can be derived information,
13 and then is it retrievable in the ordinary course of
14 business, and I think those two ought to be sorted out
15 more clearly, because they're different issues.

16 For example, if you apply for a loan online or
17 you make a customer service inquiry and associated with
18 your name comes your credit score or comes your
19 customer profile, like this is a really good customer,
20 you better really be nice to them, is that retrievable
21 in the ordinary course of business or not? And I'm not
22 arguing that, in fact, it has to be given out, but, in
23 fact, I think that would make that data retrievable in
24 the ordinary course of business, because if the
25 consumer came back, it could be -- it would be maybe a

1 new number associated with that, but it could be
2 retrieved in the ordinary course of business. So, I
3 need -- I think we need to sort out those two
4 dimensions more clearly.

5 But I'll put as an aside in terms of providing
6 access to derived data, about a -- I don't know, maybe
7 it was ten years ago, Equifax had a product that was
8 short-lived, but it was basically you got a newsletter
9 if you subscribed to this about your credit report and
10 credit facts, but one of the things they did, they gave
11 you a narrative paragraph that interpreted your credit
12 score.

13 Now, it took some software and some money to do
14 this. It wasn't the score, but it basically said this
15 is kind of your financial picture, and, in fact, when I
16 closed some open tradelines on my credit that I had,
17 that were on my credit report, my narrative got better
18 the next time I got my newsletter. So, there might be
19 some -- I'm not saying we should recommend this, but
20 for companies that wanted to do this, there might be
21 some clever ways to -- again, to provide access to the
22 information to the consumer in a way that's easy to
23 understand without giving away their corporate secrets
24 or their proprietary data and that way make everybody
25 happy.

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1 MR. MEDINE: David?

2 MR. DAVID HOFFMAN: This is more of a micro
3 question. Steve, I was wondering if you could expound
4 a little bit on what you mean by "prospect information"
5 that's included there and specifically whether the
6 prospects themselves gets to get access to that data or
7 it's the person who provided it.

8 And I ask that because the definition that's in
9 the footnote refers to a person when ordering a gift
10 that I'm assuming from what you're referencing there
11 that would then be shipped to a different person, but I
12 worry about, without having a better definition, it
13 could be extrapolated to also apply to situations like
14 a company that would monitor and run news groups and
15 chat rooms. If you're in that business, you generally
16 are going to have to record complaints from some of the
17 users about other users.

18 Would you have to provide the information about
19 who complained and what the complaint was if you've got
20 that in your systems? There's a variety of those types
21 of concerns.

22 And then I was just surprised at the
23 authentication discussion following that, that it
24 didn't include any of the issues that would be caused
25 by trying to authenticate prospects, if that's what you

1 were really going for.

2 MR. COLE: On the latter point, it's probably
3 described by different subgroups integrating work that
4 didn't start together, so let's put that one aside,
5 although it needs to be addressed, and I'm fortunate to
6 be able to be sitting next to Jerry if I need any help
7 on what prospect information is.

8 We had a limited focus. Whether it ought to
9 for this purpose have analogies that are built on that
10 limited focus is something for this committee to
11 consider, but the prototype prospect information is if
12 I buy you a Christmas gift and I want it shipped to you
13 and I give your name and address and other information
14 about you because it was pertinent to that gift and the
15 entity -- the online entity has that information, that
16 would be prospect information, and under our program,
17 you would have a right to access that.

18 MR. DAVID HOFFMAN: Who is "you"?

19 MR. COLE: "You" being the gift recipient whose
20 information it's about. The right of access would go
21 to the person about whom the information pertains.

22 MS. SWIFT: If, in fact --

23 MR. COLE: To whom it pertains.

24 MS. SWIFT: And I also think the other aspect
25 in that definition is if the business accessed that

1 information in its ordinary course of business. So,
2 I'll maybe build on the example.

3 I, Jane Swift, sent -- now I'll get -- anyway,
4 Harry & David's apples to you, and now Harry & David
5 decides through the online world to use the fact that I
6 sent you apples to start sending you mail about the
7 apples that they have on sale this month, so they have
8 taken the information that I provided, they use it in
9 their course of business, and it's information about
10 you. You would have access to that information that
11 they have collected.

12 MR. DAVID HOFFMAN: So, my follow-up question
13 would be -- I was a little bit confused by the answer.
14 Are you proposing that for this purpose we really
15 should just limit that to the information that has been
16 given to fulfill a physical product that is then
17 shipped to that user, or should -- because if we're not
18 going to do that, I think we've got some major issues
19 here that need to be brought out.

20 MR. COLE: Jane, I may need help --

21 MS. SWIFT: Let me tell you what the definition
22 is actually from the BBB Online, and we won't give them
23 any footnotes and credit for it, and I'll just pretend
24 I made this up.

25 MR. COLE: Then again, if it's lousy, we don't

1 get blamed either.

2 MS. SWIFT: Right.

3 Prospect information would mean, one, when
4 associated with an individual and can be used to
5 identify him or her, so it gives an identification of
6 when it would be personally identifiable. Secondly, is
7 elicited by the organization's online website through
8 active data collection from an individual other than
9 the individual identified by the information and is
10 retrievable by the organization in its ordinary course
11 of business.

12 It then goes on to further say that the term
13 "prospect information" does not include information
14 that the organization did not obtain online from an
15 individual or information that the website cannot
16 retrieve by the individual's name, e-mail address or
17 similarly specific identifier in its ordinary course of
18 business.

19 MR. DAVID HOFFMAN: So, that sounds like it
20 would include my earlier example about news groups and
21 chat rooms, also could include -- if someone is running
22 an online service that -- to distribute content which
23 many people may find objectionable and are getting
24 prospects of who else might be interested in that
25 service, then someone would come in and get access.

1 Now, hopefully you'd be able to authenticate
2 that person who was the individual who was that
3 prospect, but that may be difficult, but be able to
4 come in and get access to who are these people that
5 people believe would want to get that objectionable
6 material. I think there's a lot of issues there.
7 We're going -- we're going to need to work on them and
8 I think it is going to be problematic.

9 MR. COLE: I'm not sure I fully understand it.
10 I mean, I'm sure I don't fully understand it, but is
11 what -- is the kind of information you're talking about
12 now likely to be retained in a way by the online entity
13 so that it is retrievable in the ordinary course of
14 business?

15 MS. SWIFT: In order to identify that
16 individual who was talked about?

17 MR. DAVID HOFFMAN: Yeah, I think that's
18 likely, that many services would be retaining that
19 information, and to even use -- so, those are my
20 examples that are a little further out but that I think
21 are problematic, but I think that there are -- just your
22 base question, take an online bookseller. That online
23 bookseller is going to record not just the name and the
24 address that they ship that information to but also the
25 books that they ship to that address. If someone has

1 to come back in to get -- if a prospect has to get
2 access to that information, there's no information that
3 they -- that that entity has to authenticate other than
4 the name, address and those books at that point in
5 time.

6 I think that creates some real authentication
7 problems, and I think that's some information, the
8 kinds of books that may have been shipped to my home,
9 that I wouldn't necessarily want other people to get.

10 MS. SWIFT: I think you are talking about an
11 authentication, but let me just say, assuming that you
12 can authenticate that, right, if I all of a sudden
13 start getting material mailed to me or sent to me
14 online -- let's stay with that so I don't include
15 somebody else -- that I find objectionable, I should
16 have some way to find out why you possess that
17 information and how I can get rid of it.

18 For example, if I am, as I am, a mother of a
19 young child, and all of a sudden, because someone else
20 said something about me or mailed me something that
21 they assumed that I would want or ordered something
22 online they assumed that I would want, I start having
23 material come into my home that I don't want sent to my
24 home, I think the reason for providing that type of
25 access to a prospect is that I now need to have some

1 control over how to access what information you have
2 about me that led you to make these assumptions.

3 If you're utilizing that information, I should
4 have the opportunity to say I don't want you to assume
5 that because someone else did X, Y or Z, that that's
6 something that should be associated with me. So, you
7 may be right that this may be a policy discussion that
8 is a very important policy discussion, but I don't make
9 -- I mean, I think that consumers would think if you as
10 a business take information that you get from some
11 other source than me and use it as if it is true to
12 contact me or in your course of doing business, I
13 should have access to that information, because you're
14 using it in some way and perhaps in a way that I find
15 objectionable.

16 MR. MEDINE: We have a bunch of people with
17 flags up. Do any of you want to address the specific
18 issue of prospect information? Ron and then
19 Deirdre.

20 MR. PLESSER: Well, on prospect, I think you --
21 it is clearly semantic, but I think you're absolutely
22 using the wrong word, because I think that prospect
23 information in the direct marketing industry, you know,
24 means something significantly different than the way
25 you're using it here, and I think it creates a lot of

1 confusion and difficulty.

2 Normally prospect information would be, you
3 know, a mailing list you obtain from a third party,
4 that you probably don't see it, it goes through a
5 service bureau, but it is the people that you are
6 prospecting. It becomes complex because there are some
7 people who have access provisions who provide those
8 lists, and so you could go to that third party and get
9 the list, but if you're going to the merchant, it's a
10 little difficult, again, because they probably don't
11 really have it in the database or possession unless the
12 prospect responds. So, it's one of those examples of
13 where you would probably invade privacy rather than
14 limit it, and maybe you'd save it by the retrievable in
15 the normal course thing, which is a good concept, but
16 if you make it available, it's difficult.

17 So, I just think that the prospect -- to call
18 it prospect information is I think a difficult thing.
19 I don't disagree -- I mean, I -- if somebody sent me a
20 gift certificate to -- to Amazon and I bought some
21 books, I would argue that if I responded, I had a
22 business relationship with Amazon, am not really a
23 prospect, even though it came from someplace else, but
24 I don't think we're arguing about whether or not those
25 people should be excluded from access rights. I think

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1 they probably are at some level of business
2 relationship with them. How that developed may
3 be a little unique, and I think we can cover it, but I
4 think to call it prospect information is -- is --

5 MR. COLE: Ron, before we --

6 MR. PLESSER: -- is just a red flag.

7 MR. COLE: Let me make sure there's a common
8 understanding here, Ron. When I send you -- ask to
9 have a gift sent to you and I give personal information
10 about you --

11 MR. PLESSER: It wasn't you who sent me a gift,
12 but --

13 MR. COLE: Well, did it come in a brown
14 wrapper?

15 It's my understanding that that -- that you
16 would be considered a prospect by that entity. Now,
17 the term "prospect" is broader in the direct marketing
18 industry. It doesn't just include this situation. We
19 have defined it in the limiting sense. So, we could
20 use a better word, I mean --

21 MR. PLESSER: Right, that's all.

22 MR. COLE: -- that's an example of something
23 that is done for one purpose, and we shouldn't feel
24 driven by that.

25 MR. MEDINE: I guess maybe the broader question

1 is we're talking about a category of information that's
2 reported by a third party about someone else that is in
3 the files or the database of a company.

4 MR. COLE: And collected online from that
5 person.

6 MS. SWIFT: And then used.

7 MR. MEDINE: But let's pose the sort of
8 question that that poses, which is should I get access
9 if I'm the subject of that information but the
10 information was reported to the website by a third
11 party?

12 MS. SWIFT: And I think what we're saying is
13 you should if that information is used by the company.

14 MR. MEDINE: Okay. Does anyone feel that
15 that's a category of information that you shouldn't
16 have access to?

17 Tatiana?

18 MS. GAU: Tatiana Gau.

19 How do you deal with the notice issue in that
20 situation? Because the person who has received the
21 books doesn't necessarily realize that Amazon has data
22 on them and is going to, in fact, target them. So, how
23 would they know to -- even the fact that they have
24 access, because they haven't been given any notice?

25 MR. MEDINE: Well, turning that around, then,

1 would you suggest that notice was appropriate in that
2 situation?

3 MS. GAU: I think that it really all depends on
4 the company's approach to the situation. Now sometimes
5 you're seeing with some deliveries and shipments, you
6 are getting a statement of the company, you know,
7 terms along with like a copy of the printout if you
8 need to return the item. Sometimes there are terms of,
9 you know, agreement and different stuff like that
10 printed on the back of a form. So, it could be done in
11 that fashion.

12 MR. MEDINE: Deirdre?

13 MS. MULLIGAN: I wanted to respond to two
14 things, one to David's concern and then to your
15 question.

16 David's concern about, you know, whether or not
17 this further complicates access, because I think you
18 were saying there's an authentication problem, right?
19 And I think it's kind of interesting, because Dan
20 Schutzer before was talking about using another
21 channel, right? You have -- Tatiana was just saying,
22 so, I just got the book from Amazon, I now go and say
23 to Amazon, what information do you have on me? So,
24 there's already -- I have the book, and I say, I just
25 got this book from you, da-da-da, my name is Deirdre

1 Kathleen Mulligan, and so there's a lot of circular
2 data there.

3 You have in some sense almost an additional
4 check, because I actually received a product to an
5 address through the mail. I mean, so, I think you're
6 right, there are authentication issues, but I don't
7 know that they're any different than some of the other
8 areas that we've looked at already.

9 I think that we do need to define "prospect
10 information." I think that there -- I think that
11 actually the prospect information combined with the
12 retrievability issue does respond in many ways to Ron's
13 question, because if I'm a company and I'm doing a
14 mailing based on a prospect list that I've gotten from
15 somebody else and I don't have it, then yes, it may be
16 prospect information, but it's also not retrievable.
17 So, you'd say, I don't have that data, because actually
18 it's a blind mailing, it's done through a third party,
19 and so I don't think there's actually an issue there
20 that needs to be addressed. I do -- I don't think that
21 means that we don't need to define "prospect
22 information." I think we do.

23 Can I add an additional -- I think that the
24 default rule approach is, in fact, the approach that
25 you have in most statutory rules dealing with privacy,

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1 in most business practices dealing with privacy. It's
2 that you have access, and then there are some
3 exceptions, we call them usually, and, you know, the
4 goal is to enunciate where there may be exceptions, and
5 I think Jane's right that whether or not we like or
6 dislike this approach will a lot depend on what those
7 exceptions are.

8 I think many of the exceptions that have been
9 articulated earlier on were useful, you know, does it
10 implicate somebody else's privacy? David asked -- you
11 asked a question, should I get access to data that
12 somebody else provided about me? Well, if, in fact,
13 somebody else is reporting me as a child molester to a
14 law enforcement agency through a website, they have
15 certain data about me, maybe there's a mitigating
16 circumstance there and I don't get access, or you can
17 see there may be mitigating exceptions, but I think I
18 would want to articulate those.

19 I think generally the answer would be yes, you
20 have data on me, it's personal information, you have
21 it, it's retrievable, it meets the definition, I get
22 access, unless there's some other mitigating factor,
23 which I think is generally what's been laid out.

24 The one concern that I have with the default
25 rule as it currently stands is the notion it's very

1 tied to in many ways an offline model of what
2 identification is. It's tied to name, address,
3 something else that is, in fact, kind of an offline
4 identifier. It kind of explicitly excludes some of the
5 things that we've talked about, unique identifiers that
6 are going to take the place.

7 You know, if we had done this a few years ago,
8 people would have said, Well, e-mail addresses aren't
9 really personal information. You can have six of them.
10 We don't actually know what the person's name is.
11 Well, yeah, but I mean we now treat those as something
12 that is an identifier, and so I'm anxious to make sure
13 that this is not outdated because we have cataloged a
14 set of identifiers that don't actually include the
15 identifiers that are going to be used to identify us in
16 the online world, and I would -- I think that a lot of
17 that has been dealt with in earlier discussions.

18 We have had a lot of people say that if, in
19 fact, it's retrievable and it's about a specific
20 individual or it's collected as though it was about an
21 individual and it's being used to make decisions.
22 There may be some mitigating circumstances. I think
23 we've -- you know, Dan and I have had some back and
24 forth, are we compromising somebody else's privacy, is
25 there another way, should we require a deletion rather

1 than access, what can we do, but I don't want to lose
2 the notion -- I don't want to outdate ourselves by
3 saying if you don't have the name and address or the
4 e-mail, there's no privacy consideration here, there's
5 no access consideration, because I think we're going to
6 see many databases that are based on other identifiers.

7 They may be digital signatures, they may be
8 things that move us into the online world and out of
9 the offline notion of what is an identifier.

10 MR. MEDINE: Andrew?

11 MR. SHEN: Andrew Shen, EPIC.

12 I would like to echo some of Deirdre's
13 comments. I think they are very intelligent ones.
14 Maybe one advantage of staying at the 50,000-foot level
15 is that we make these sort of representations, make
16 them last as long as possible, and there are, of
17 course, other considerations, of course, it's very
18 difficult to implement those sort of things, but that's
19 one thing we have to remind you, keep these
20 recommendations as technology-neutral as possible, make
21 these be guidelines that can stand the test of time.

22 Several points, responding to what Lieutenant
23 Governor Jane Swift brought up in the beginning.
24 Enforcement, I think in the security section, there are
25 enforcement options. We didn't necessarily even

1 endorse any enforcement selection, but I think maybe
2 that's something as a starting point we can consider
3 for the entire document, so that it can encompass
4 access and security, but that's something we can talk
5 about of course further.

6 And second, I'm a little worried that this
7 "ordinary course of business" phrase is sort of like
8 saying "reasonable." What does that mean? For
9 example, Dash.com provides a different level of access
10 than say DoubleClick, and they are in roughly analogous
11 businesses, so what is the ordinary course of business?

12 For example, a lot of companies are
13 participating in something called Consumer Profile
14 Exchange, CPEX, which is a standard for exchanging
15 information about internet users. Now, they are
16 transferring information about people in the ordinary
17 course of business, and obviously they have an ability
18 to do that, and so there should not be an ability to
19 provide access to the subjects that that information
20 actually describes.

21 MR. MEDINE: Why don't we go down the line,
22 because we have a bunch of folks here, Tom and then
23 Ted.

24 MR. WADLOW: Yeah, the "ordinary course of
25 business" phrase kind of had me concerned, too, and

1 there seems to be -- I'm just thinking through the
2 examples that we've been talking about here. Some
3 things that come to my mind are, for example, I send a
4 number of books every year to my sister, and Amazon has
5 her address online, and when I deliver -- when I choose
6 to send things there, I send them there.

7 Well, of course, now they're shipping books to
8 my sister, and that seems like something that is in the
9 ordinary course of business, but if that was all they
10 did, I wouldn't mind so much and wouldn't necessarily
11 feel that my sister needed to have access to that
12 information if that's all they were doing. They keep
13 that information available in case I want to send books
14 to my sister again. That also is getting a little
15 bigger, but it's still pretty straightforward there.

16 But if, in fact, then they start sending e-mail
17 to my sister, then -- you know, indicating that they
18 would like my sister to buy more books of the kinds
19 that I sent to her, now we're getting very deeply into
20 the situation where I think that some additional
21 guidance needs to be put in place there.

22 You know, there's a number of other issues that
23 become very interesting with something like this where
24 you have -- I mean, we were talking earlier about
25 pseudonymity, and in a sense all of these different

1 accounts, all these different informations are sort of
2 vaguely pseudonymous. An example is, you know, let's
3 suppose that everyone here were to send a gift to
4 Deirdre for her -- all her good work. Well, we all
5 might get a slightly different version of her address.

6 Now, instead of having one odd thing, now she's
7 got 40-some different versions of herself with that
8 system, and it becomes a very tricky and interesting
9 problem.

10 MR. MEDINE: Ted?

11 MR. WHAM: Ted Wham. A whole grist of
12 different wonderful things here to kind of consider.

13 First of all, in terms of access to the
14 information and what level -- topping off on what David
15 brought up as the whole issue of, you know, how much do
16 I get to see what other people have provided about me,
17 that brings the whole question of whose data is it,
18 right, who is the owner of it, and I'll use the example
19 of Bay.

20 If I go and conduct a transaction on Bay, Bay
21 is facilitating a transaction between me and a third
22 party, and at the end of that transaction I can put in
23 a vote on that third party about how responsive they
24 were, whether they actually fulfilled the
25 transaction, so I can rate them one to five or

1 something like that.

2 A compilation of those ratings over time will
3 tend to affect the ability of that individual to
4 transact yet future transactions, so that if a bunch of
5 people give them negative responses, they are not going
6 to get any buyers in the future. Okay, so, whose data
7 is that, all right? Is the sum that it averages to
8 2.9, that probably belongs to the individual who was
9 selling the data on there, but do they get to find out
10 that, you know, I gave them a vote of a 1.4 or that
11 somebody else out there said that --

12 MS. GAU: Yeah, you do. You do. It's all
13 posted publicly.

14 MR. WHAM: But I can't necessarily -- and I am
15 not an Bay user, so I might show my own ignorance in
16 this case, but I don't know if I can necessarily get
17 back to the real identity of the person who is posting
18 that information, even if Bay has it.

19 MS. GAU: If you're a registered user, you can
20 at least know how to contact them.

21 MR. WHAM: Okay, I kind of question whether we
22 would want to enshrine that type of a system where
23 someone is making a vote on the quality of somebody
24 else's services, is in a position where they can be
25 harassed by the person to whom they have given that

1 vote on.

2 MS. MULLIGAN: I think that's where there's
3 maybe an exception.

4 MR. WHAM: Exactly, a whole host of mitigating
5 factors, and so it comes down to whose data is it and
6 to what degree do you want to view it, and to come down
7 to a notion where you have categorical access across
8 the board offers some problems to that.

9 Couple other things I wanted to bring out, Jon
10 Smith had the comment about protecting pseudonymity. I
11 think that that's an excellent goal that we would like
12 to have. I think along the way we need to recognize
13 that there's instances where if the customer wishes to
14 be, you know, representing themselves other than who
15 they are, that business needs to have a right to say
16 well, then, I don't want to have a business
17 relationship with you, and that you don't want to
18 require a business to have a relationship with someone
19 who doesn't want to, you know, give their real
20 identity.

21 There are countless examples of that from
22 companies that require an e-mail response, and you've
23 got to actually confirm that your e-mail is an actual
24 logged e-mail address because that's a fundamental
25 portion of how the system is run, to other businesses

1 that require that you provide a true credit card if you
2 are going to do an online bidding situation, right, so
3 they can show that you're not -- that you can fulfill
4 all the ordering and some things of that nature.

5 The last thing is I want to talk a moment about
6 the total access provision and contrast that to the
7 ordinary course of business. I've heard some comments,
8 my colleague just to the right, Tom here, was talking
9 about ordinary course of business causes some concern
10 for him, and I -- and I realize something that may not
11 be really clear, and that is that there's a bunch of
12 data that is collected that is categorized in one
13 method that's very easy for businesses to get to, and
14 the data may be available, but it's not categorized in
15 another method that it is equally easy for them to do
16 it.

17 So, I'll use the example of the paper day
18 planner. If you come to me, you know, okay, first of
19 all, you have got to go back a few years, you know, to
20 the use of a paper day planner, and we will make fun of
21 those of you who still do who are in this room, but if
22 you look at a paper day planner, it is very easy to
23 say, what did you do on March 22nd? You can go through
24 and say I was here, I was here, I was here, I was here.
25 But if you want to go through and say what are all the

1 meetings I had with Jane Swift, that's substantially
2 more difficult to achieve, right, you have to go
3 through all the different days and catalog all that
4 different information.

5 Is the data present? Yes. Is the data
6 collected for a legitimate business purpose? I would
7 argue yes. Is it available in the ordinary course of
8 business for the user of that day planner? I would
9 argue no, that that's not typically what somebody uses
10 that day planner for. Instead they want to find out
11 what I'm doing tomorrow. To have a requirement that
12 that data be available, it is technically achievable,
13 you can cross-reference it in a different method, but
14 now you're creating access to a bit of information that
15 was never available to the company before, and you're
16 creating a privacy risk as a result of that, because
17 now I'm starting to look at all the things I did with
18 Jane Swift --

19 MS. SWIFT: Except under your definition,
20 because it's not retrievable in the ordinary course of
21 business, it would not be available to access by the
22 third party in that case.

23 MR. WHAM: I'm not referring to third party,
24 I'm referring to -- to Jane Swift. Okay, so, the
25 example --

1 MS. SWIFT: I would be the third party.

2 MR. COLE: To assist this conversation, can I
3 just read the definition, because there is a definition
4 here. We may hate the definition or we may like it,
5 but let me give it a try. "Information is retrievable
6 in the ordinary course of business only if it can be
7 retrieved by taking steps that are taken on a regular
8 basis in the conduct of the business with respect to
9 that information or that the organization is capable of
10 taking with the procedures it uses on a regular basis
11 in its conduct of its business. Information is not
12 retrievable in the ordinary course if it would impose
13 an unreasonable burden."

14 So, under this rule, if, in fact, this is
15 information that on a regular basis the organization
16 does retrieve, or using the software programs and other
17 techniques elsewhere in the business it could easily
18 retrieve it upon your request and there's no big cost
19 attached to it, it's no big deal, yes, it should be
20 made accessible.

21 MR. WHAM: Okay, I want to touch on that,
22 because I'm very comfortable with that type of a
23 construction, and my understanding is that that's the
24 premise behind the default rule and that instead the
25 premise for the total access rule is if you've got it,

1 you've got to make it available.

2 MS. SWIFT: Right.

3 MR. WHAM: And to the point of creating systems
4 that don't otherwise exist to make that information
5 available.

6 MR. COLE: That is a key distinction, that's
7 right.

8 MS. SWIFT: And to the degree you go through
9 and define every single example, such as my Harry &
10 David, your Amazon.com, you're getting into and
11 bleeding into the case-by-case approach.

12 MR. WHAM: Okay. So, I would -- I want to
13 posit something, and I think I am going to get shot
14 down on it, but I want to throw it out there anyway,
15 and that is if -- I have to use an example first.

16 Excite assigns a cookie to individual users,
17 both anonymous and registered. Those cookies are
18 reported in log file transactions, and we use it to
19 identify numbers of unique users, becomes a unique
20 identifier so we can remove duplicates within certain
21 context areas, and we need the log file transaction to
22 be able to determine page views within a given area,
23 not necessarily who the people are.

24 I have all the building blocks to say where did
25 David Ellington go? I do not use that information

1 today, and I do not go through and I don't have the
2 processes to go through and say I want a profile of all
3 the different page views that Mr. Ellington does.
4 Dash.com does, but I don't have that model right now.
5 Could I create it? Yes.

6 My understanding is that under the total access
7 provision, I would be required to generate that model,
8 I would be required to go through those processes and
9 create a set of knowledge about data that I did not
10 previously have. Is that -- do people -- are there
11 members of this committee who believe that that's a
12 reasonable goal that we should strive for? I see that
13 as being really risky.

14 MS. SWIFT: But -- I think you're expressing
15 your opinion, but I think the most important thing is
16 to try to get people to a comfort level of each one,
17 and as I said before, if you want to go to -- but I
18 think it's sort of useless, because whether -- unless
19 you have a need to know who supports which approach, I
20 think what we're trying to do is define the broad
21 spectrum of approaches, try to determine what would be
22 the model of those approaches, and we could sit here
23 and take a vote, but I think depending on a variety of
24 different circumstances, like who enforces it and what
25 the details become, people are going to vote in

1 different ways, and I can promise you we will never
2 come to consensus on one approach.

3 MR. MEDINE: Again, the goal is not to come to
4 consensus, and I will say that having the different
5 models out, even if just to contrast with the other
6 models, is a useful technique, and the pros and cons
7 associated with each.

8 MR. WHAM: So, I am not looking for a straw
9 vote, not looking for it, but I'm saying as an overall
10 policy objective, is there anyone in this room -- and I
11 suspect there are, so just if there is, you know, say
12 so now -- is there anyone who believes that a total
13 access rule that requires businesses to create
14 categorization of data that they do not already have is
15 something we want to endorse?

16 Because if there's no one who wants to endorse
17 that, then we should list it in the report and say it's
18 possible, but we think it's a bad idea because of the
19 negative privacy implications.

20 MS. MULLIGAN: Can I respond since I --

21 MR. MEDINE: Sure.

22 MS. MULLIGAN: I certainly don't want to create
23 a system where we are -- the system you're describing,
24 there is a very good paper that was written by Ed
25 Palecky (phonetic), and he's the privacy commissioner

1 in Ontario, and it talks about systems that bifurcate
2 systems and transactions, which is basically what
3 you're talking about, and that that is, in fact, a very
4 privacy-enhancing feature.

5 Now, the fact that you have -- whether or not
6 you're retaining a key that allows you to link those
7 becomes very significant, all right, and what you're
8 saying is you have a system, you have two parts, and
9 you have no key.

10 MR. WHAM: I can put Humpty-Dumpty back
11 together, but I don't put Humpty-Dumpty back together.

12 MS. MULLIGAN: Right. Now, I guess part of the
13 issue is that you can -- and depending, if I come in
14 with a subpoena because I want to have information
15 about what my husband's doing -- my future husband, by
16 the way, or --

17 MR. MEDINE: Congratulations.

18 MR. PLESSER: I was starting to wonder if there
19 was an announcement.

20 MS. MULLIGAN: -- and I do want all that
21 information, or if law enforcement comes in because
22 they want access, I mean, there is a privacy risk here.
23 Now, do I want to create a system that makes that
24 retrievability easier and encourages more malicious
25 behavior, more inquisitive behavior? No, I want you to

1 design systems that limit the risk. But for me, the
2 corollary -- the corollary piece of this is that
3 self-regulation might be able to do a lot of things.
4 It can't address the two scenarios that I just put on
5 the table.

6 If somebody comes to you with a subpoena,
7 somebody comes to you with a warrant, it's really nice
8 that you don't want to give them access, but that
9 doesn't mean you're not going to.

10 MR. WHAM: I may not have a choice, yes.

11 MS. MULLIGAN: So, there is a need to
12 acknowledge that even though you may not be doing it,
13 it may not be retrievable in your ordinary course of
14 business, that it exists and it is retrievable when
15 push comes to shove and that we need rules to stop that
16 shoving.

17 MR. WHAM: Okay, I could not agree more, but do
18 we want to suggest --

19 MS. MULLIGAN: Maybe we can get that in the
20 report.

21 MR. WHAM: No, I mean, do we want to suggest
22 that having total access, that we would suggest that
23 having -- that creating means of access when they
24 otherwise would not be created by the businesses is
25 something that is a legitimate policy option that we

1 would -- at least one of the members of the committee
2 would want to endorse?

3 MS. MULLIGAN: I would love to write a section
4 with you that basically said we think that this
5 bifurcation is good, we would prefer that people not
6 link this data, that they not have keys available that
7 allows this, but we understand that there is still
8 risks in our existing legal environment and that this
9 committee thinks that in addition to addressing this
10 access issue among the private sector, that there is a
11 real need to look at setting limits on third party,
12 real third party, so, you know, me going in after my
13 husband's, right, and law enforcement.

14 MR. BAKER: I think Ted asked the question, and
15 I don't think that's the answer. He asked a simple
16 question, does anybody support this option?

17 MR. SHEN: Yeah, I support this option, and I
18 think some of the privacy risks can be avoided.

19 MR. WHAM: So, you do believe that I should
20 create a system that allows me to know more about you
21 than I otherwise would? That seems so
22 counter-intuitive to me.

23 MR. SHEN: You actually already have a system
24 right now that has all that information in it, if I --

25 MR. WHAM: I agree, but I don't use it in my

1 business, so literally, if you're on my site every day,
2 I don't know where you go. I really don't, okay? You
3 might argue that it might be a good business decision
4 for me to do it, and I think I could probably make that
5 argument quite well, but I don't know that today, and
6 if you make total access a policy requirement, I'll use
7 it, and let me tell you, if I have to spend the money
8 to catalog the data that way, you can bet your sweet
9 ass I am going to start using it to do things to you
10 that I don't do today.

11 I will spend a small fortune -- my choice of
12 phrasing might have been poor, but I will have to spend
13 a small fortune --

14 MS. MULLIGAN: We are sending you downstairs.

15 MR. WHAM: -- I would have to spend a small
16 fortune to build that type of data, but if I have to do
17 it, I will use it to change your experience on my site,
18 all sorts of things that I think will make you feel
19 worse at the end of the day than better.

20 MS. SWIFT: Can I just say in the pros and
21 cons, opponents would argue that -- opponents would
22 argue, I think we might have lost a piece in the
23 transition. Under opponents would argue on page 9 of
24 the total access approach, the next to last bullet
25 says, "Providing access to derived data would affect

1 the confidentiality of," and I think that was supposed
2 to say "consumers" if I'm not mistaken, which is
3 exactly what opponents are saying. So, we did try to
4 build in those types of considerations, recognizing not
5 everybody agrees that that has to happen.

6 MR. WHAM: But my question still remains, with
7 this new bit of data input, do you still want me to
8 provide -- a reasonable alternative, one of many to
9 consider for the FTC and others -- total access?

10 MR. MEDINE: I would like to try to break at
11 noon, so maybe just to bring more people into the
12 discussion, I think we -- I think we appreciate the
13 point, and if people want to address that, they
14 certainly should, but James has been waiting patiently.

15 MR. ALLEN: I'm making a long list of things to
16 talk about, James Allen.

17 First of all, I was on the -- this committee --
18 this subcommittee and having seen the work in the light
19 of day integrated with everything else makes it look
20 very different than it looked a week ago when we were
21 putting it together, and so there are a few things that
22 I would like to suggest that we do in general to the
23 report.

24 One is to avoid names -- section names that
25 imply some kind of value, and I think, for example, the

1 default name implies something more than it was
2 intended to mean. It might be a lot more neutral just
3 to say option one, option two and option three.

4 Furthermore, I think that throughout this
5 document we've implied definitions of terms that are
6 then used in different ways other places, and I'm
7 having some trouble -- the most obvious one is where we
8 define that personally identifiable information doesn't
9 include stuff that's nonretrievable. I mean, I -- I
10 think most of us or many of us or certainly I would say
11 that's not true, and I think we have to be very careful
12 with the terms we have used throughout the document.

13 Third is that there have been -- there's some
14 value statements implied in the text of the document
15 that -- the text quality, better in the pros and cons,
16 and specifically I'm concerned about the statement that
17 the case-by-case, so-called case-by-case approach is
18 implicitly or by definition more complex than the other
19 approaches, because I don't agree with that.

20 Third of all, I think we're really trying to
21 oversimplify this. Both the default -- so-called
22 default approach and the total access approach are
23 trying to grossly oversimplify a terribly complex
24 issue, and I think that, in fact, when you dig into it
25 and you look at all the qualifications that are

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1 embodied in the so-called default case and then try and
2 put parameters on them so you could actually implement
3 it, you end up with a case-by-case approach, which is where
4 I started, and most of my parameters somehow ended up
5 being deleted out of the final text, and I'm going to
6 hope to get them back in by working with the final
7 drafters, by putting them in as a case study, because
8 they were originally in as an example.

9 But I really feel like we're grossly
10 oversimplifying this thing and that we really should
11 say -- we could say in one paragraph, you could give
12 access to everything, and that's total access, and
13 everybody agrees that that's not realistic. And then
14 you could give access to nothing, and that's the no
15 access case, and everybody agrees that's not what we
16 want to do. So, now let's talk about how we deal with
17 the complexities, the sensitivity of data, the source
18 of data, who certified it, how retrievable it is, et
19 cetera, et cetera, because we really need to deal with
20 those to have any kind of a report that has any value.

21 MS. MULLIGAN: Can I just say, if we deleted
22 it, we had no intention to delete anything. It was --
23 every piece of text that was in in anybody's document
24 was supposed to be here, and so if we did, I hugely
25 apologize.

1 MR. ALLEN: I am not complaining. In fact, the
2 more I look through the document, the more I find
3 pieces that I thought got deleted. So, most of them
4 are probably there, just not in the form that I
5 expected to see them.

6 MS. MULLIGAN: Okay, the online version had the
7 red, purple, blue, green that people could follow, and
8 I'm sorry you don't get that in here.

9 MR. ALLEN: I think you did a great job.

10 MR. MEDINE: And before Stewart, in addition to
11 my plea to webmasters, let me make one to consumers,
12 and that is on the notice aspect, admittedly notice is
13 not the focus of this group, but somehow whatever gets
14 decided on access will have to be translated into
15 notice to some extent, and so I would again keep in
16 mind that the complexity of whatever model people
17 prefer, how you translate it into that -- in an
18 understandable fashion so consumers appreciate what
19 access is being provided.

20 MR. ALLEN: One more thing I forgot to say.
21 Andrew referred to the CP Exchange group or CPEX as he
22 referred to it, but that's an industry group that's
23 defining standards. They are not exchanging
24 information about consumers today. It's -- it's a --
25 you know, it's a standard defining work now, and it's

1 not something that's going on today. I would hope that
2 some of us around the table who are participating in
3 that group don't get tagged with having -- with doing
4 this today.

5 MR. MEDINE: Stewart?

6 MR. BAKER: Now, this has actually been a very
7 helpful discussion, and I think it plays off of a
8 concern I've got about the document, which is a sort of
9 formlessness to it and a lack of clarity to the options
10 for decision makers. You know, for example, in this --
11 in this option, if you pick the default option, you
12 could charge \$15, but if you pick the case-by-case
13 option, you couldn't. I mean, this doesn't really make
14 much sense. It's just sort of what you get when you
15 dump the options together.

16 I think we also have the problem that the
17 options are really not a representation of the range of
18 potential views in the room. We have a total access
19 option, which has some support in the room. We have an
20 option that says basically you provide access unless,
21 you know, it costs you as much as a kneeling bus
22 (phonetic) to produce it, and then you've got a
23 case-by-case, which is hard to define in advance and
24 just below a lot of talk.

25 It seems to me that at a minimum we need an

1 option that represents a sort of response to reasonable
2 access that is much more limited than any of these
3 options, and, you know, I'll put my hand up, I support
4 much more limited options than any of the three that
5 are listed here, and I think we need to put something
6 in that focuses -- that simply says reasonable access
7 means is this information maintained in a fashion that
8 will actually have significant consequences for the
9 consumer you're maintaining it about? Is it
10 susceptible to some kind of correction so that people
11 would want to get access for a correction purpose? And
12 that would be it.

13 It seems to me that's an option that then
14 allows decision makers to see the range of potential
15 views on the -- on the committee, and I will, with some
16 trepidation, volunteer to circulate a draft in the next
17 couple of days, if that's okay.

18 MR. MEDINE: Good, thank you.

19 Lorrie?

20 DR. CRANOR: Yeah, I have a few things. There
21 was a --

22 MR. MEDINE: Could you use the microphone?

23 DR. CRANOR: Sorry.

24 There was a statement made that information
25 about third parties, you could not authenticate, and I

1 just want to point out that if somebody orders a book
2 for me, when that book arrives, it could come with a
3 statement that includes a password or some sort of a
4 code which I could use if I wanted to go back to the
5 company and find out what they have on me. So, that's
6 sort of a red herring.

7 Also, I wanted to reiterate something that Mary
8 raised a while back about the matrix that she proposed
9 and I think it's important to look at. She had said
10 that we need to look at whether data is derived or not
11 derived, and that's one of the differences between the
12 -- two of the options that we have here, and then also
13 whether or not it's retrievable in the ordinary course
14 of business. That's four boxes. We only have three
15 options. I think we need to make sure that all four of
16 those boxes get covered, as well as the additional
17 access that Stewart just raised, which I think needs to
18 get covered, as well. So, we really need to highlight
19 all the different pieces of the option.

20 MS. MULLIGAN: Lorrie, can you just say those
21 four boxes again?

22 DR. CRANOR: Two by two matrix, derived or not
23 derived, and retrievable in the ordinary course of
24 business or not.

25 DR. CULNAN: Or it could be even collected

1 online was -- yes or no, so it could be -- if not
2 collected online but it's retrievable in the ordinary
3 course of business by PII.

4 DR. CRANOR: In fact, the not derived is
5 collected directly versus derived are those two
6 choices.

7 MS. MULLIGAN: Well, there's collected
8 directly, there's collected from another source but not
9 derived, and then there's derived.

10 DR. CRANOR: Right. I mean, you could expand
11 the matrix to be more than a two by two if you wanted,
12 as well.

13 MS. MULLIGAN: Yes.

14 MR. ELLINGTON: Thank you, David Ellington. I
15 just wanted to comment in support of what Ted had just
16 said. I -- I'm a little surprised that -- Andrew, I'd
17 like you to respond to this, if you could, just
18 briefly. I was a little surprised that you would want
19 us in industry to actually create a category, and I'm
20 -- and not expect us to have to develop a way to use it
21 to cover those costs, to actually pursue that, and I'm
22 -- the reason why I'm saying I'm surprised is because
23 as an individual, of course, I have a lot of -- I've
24 been supporting the consumer side, so I have had this
25 conflict listening to all of the discussions, but of

1 course I'm running a business, too, and I'm an
2 entrepreneur.

3 So, how do you reconcile that? You actually
4 want me to do something? I'm not clear.

5 MR. SHEN: Well, maybe I should clarify, and I
6 think that's -- you know, Ted brought up a very
7 important point, a very important consideration. No, I
8 don't want Ted to -- or you, I guess, as a businessman
9 to go through and categorize log data, clickstream
10 data, transactional information in every single way
11 possible, in some ways to convey to me, the consumer,
12 the data subject, the amount of information you have on
13 me. I think in some ways we can get around that
14 obstacle, and to be quite honest, I don't have a ready
15 answer, because I think Ted brought up a very
16 interesting question, but I think total access in all
17 of its other elements and its -- and whatever it adds
18 to the default option is an important consideration and
19 something we should continue to consider.

20 MR. MEDINE: Okay, we have time -- why don't we
21 just freeze the flags that are up and just go around,
22 starting with Jim around to Lance, and then we will
23 call a break.

24 Jim -- Ted?

25 MR. WHAM: I'm sorry, I --

1 MR. MEDINE: Muzzle. I think we have got to
2 keep on going.

3 MR. WHAM: I just thought that was a nonanswer.

4 MS. GAU: I know, I agree with you.

5 MR. WHAM: I mean, if you -- if it belongs in
6 there, I'm more than happy, if there's one person who
7 thinks that we should categorize data that's not
8 otherwise categorized, I'm happy to have it represented
9 in the report, this is a community of opinions, but I
10 didn't hear you say that.

11 MR. ELLINGTON: I understand, Andrew, and I
12 have listened to you on the phone and I have listened
13 to your comments here before, and I have nothing but I
14 think -- I agree with a lot of what you've said on a
15 variety of issues. It's just that piece is very
16 strange to me, just didn't fit.

17 MR. TIERNEY: Let me first respond to this. I
18 think it's a bit unfair to say to Andrew is there
19 anyone here who has this ridiculous position, and
20 Andrew says yes, and then when he answers, they say,
21 well, that's not a real answer. Now, I -- so, I think
22 it's clear that he has the position and he has every --
23 now, it also happens to be not my position. My
24 position is actually to be option one -- is that
25 good? -- we will call option one, and you can all guess

1 what that is.

2 No, the real reason I put my flag up is that I
3 wanted to say some good words about this term "ordinary
4 course of business," if I could. I like it for three
5 basic reasons. The first is that it is understandable.
6 It is understandable in the world, dare I say, of the
7 law. It's also understandable, I think, intuitively to
8 lay people. You kind of -- it is something you can
9 understand, and I think that makes it very valuable as
10 we look towards figuring out -- yes, I will use the
11 word "enforcing" -- various aspects of these principles
12 that we're talking about, in this case the principle of
13 access.

14 The second thing I like about it is that it is
15 flexible. It is by definition, will emerge and change,
16 and once people understand, businesspeople understand
17 that, indeed, their information that they collect in
18 the ordinary course of business will then become public
19 to people, they might want to change those ordinary
20 practices, and that's okay, too, because that's the way
21 the system works, and, for example, I think Andrew's
22 point was, well, some ordinary course of business, some
23 of these businesses I might not like. That's okay.
24 That's to be resolved in another forum.

25 The point is, I guess to my third reason to

1 liking it, in addition to being understandable and
2 flexible, goes back to Larry's point about the
3 principle. It enhances transparency in this area. It
4 allows people to get a fuller understanding, as all of
5 us have been fortunate to do around this table, of the
6 complexities of the issue, if you will, James, and of
7 how complicated and hard this is to understand, and
8 then if access is available in the ordinary course of
9 business, people will come to understand the business
10 and therefore I think have a higher level of
11 information they need to make whatever public policy
12 decisions they would have to make later on.

13 MR. MEDINE: Dan?

14 DR. SCHUTZER: The difficulty I had with this
15 section is that it was okay in the beginning where we
16 tried to elaborate different situations, but as we
17 begin to discuss these options, and I hear people who
18 talk around it, well, you know, it starts to turn out
19 that we start putting adjectives and exceptions to all
20 of them, right? So, we talk about full, but then we
21 talk about there are some exceptions about derived and
22 there are some exceptions about -- and the same with
23 the default and the case-by-case. What do we mean by
24 case-by-case? And we end up with an example that sounds
25 remarkably like the default.

1 So, I say to myself, are these really options,
2 really? I don't know, because by the time you put all
3 the right caveats and conclusions, they might all three
4 be closer to each other, and there might really only be
5 one option. I don't really know that, because no one's
6 really made the effort to really seriously take these
7 three pure things and talk about things that would be
8 reasonable to apply. So, I don't think we've worked
9 hard enough at this particular case to really drill
10 down.

11 I suspect we only have one option. We have
12 lots of pros and cons. We have some words we'd like to
13 put in in terms of reasonable, but we only have really
14 one option that I see there.

15 At another point, just to put on my consumer
16 hat, now, walk away from business and put on my
17 consumer hat, what would I like to see as a consumer, a
18 rather paranoid kind of consumer, where I would like to
19 have really good control and access to all the
20 information on me, but I certainly would not like
21 companies to be able to integrate those in all ways. I
22 would like very much to have indices where things are
23 very compartmentalized, and I might have to do some
24 heavy lifting, and that heavy lifting may not be as
25 heavy as you think, where I can pull on all this

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1 different information from different sources that have
2 different indices and different kinds of addresses,
3 different kinds of IP, e-mail, et cetera, so I can get
4 a complete picture of what everyone has on me, but it
5 would be extremely difficult for any company or even
6 sometimes subsidiaries of the same company to get that
7 same clear picture, and I suspect that most customers,
8 most consumers are probably like that, like -- more
9 like me, in the case that many times their motivation
10 in spreading their business around is twofold.

11 Sometimes spreading it around will find the best deal,
12 but sometimes spreading it around just so their
13 information is different and distinct and not so well
14 integrated. So, those are two points I have to make.

15 MR. MEDINE: Ron?

16 MR. PLESSER: I think it follows the track,
17 concentrating on really the default option, there's a
18 couple of concerns in there, and also on this viewing
19 concept. The proponents of the approach would argue
20 that consumers be able to view passively, and also in
21 the last sentence, I guess on page 5, "This system
22 would be consistent with the storage and use practices
23 of the business." I think we're very concerned or many
24 people are concerned that, you know, if access is
25 provided, that it should be provided and could be done

1 in a return e-mail, maybe even in mail, but the
2 question of kind of an online, realtime access, and
3 this last sentence, I think, at least raises that
4 spectre, that, you know, you have to do it consistent
5 with the practices of the company.

6 Well, if the practice of the company is to use
7 the data online, I'm not sure -- I mean, at least it's
8 an option. I think it's a big jump to say that the
9 consumer should be given instantaneous online access.

10 You gave me kind of a feed before on
11 proprietary information, and I just want to follow
12 that. The way it is in this group is that it's a
13 subset almost of derived information, and I -- I don't
14 think it is. In some cases it might be. I mean,
15 direct information may identify a proprietary
16 consideration, but there could be proprietary
17 information, how -- what can -- what suppliers you use,
18 what methods you use or procedures or manufacturing
19 processes, there could be a lot of things that could be
20 disclosed in an access request that could be proprietary
21 that's not necessarily derived.

22 So, I think that's a concept that's absolutely
23 not clear in the papers, and even I think, you know,
24 when -- I think the prior work of the FTC, the
25 Department of Commerce and even the safe harbor all has

1 a clearer sense of, you know, proprietary information.
2 So, I think that has to be done, and I think -- I won't
3 say that we're using the wrong word here with
4 "derived," I mean that's also a -- kind of a cross-over
5 word, but I think we have to define it and give some
6 examples or talk about it.

7 You know, I think we -- when we first started,
8 I gave the examples of, you know, American Express
9 where you get -- you know, I took three trips on
10 airplanes or four trips on airplanes in the last year,
11 they'll tell me which trips I went, where I went, where
12 I -- you know, but then do they characterize me as a
13 frequent flyer or how they characterize me for a
14 mailing or a promotion I think is different, and that's
15 what -- I think the reports really need to delve a
16 little bit into that differential.

17 It's fine to talk about -- I support how
18 derived data is treated in this default approach, but I
19 don't think it's limited, because it really doesn't
20 describe what it is. So, we'd be happy to help in that
21 process.

22 MR. COLE: It's not in the default.

23 MR. PLESSER: It's in the default.

24 MR. COLE: It's not supplied by the individual
25 online. It's in the total access.

1 Jane? I'm sorry.

2 MS. SWIFT: That's okay.

3 MR. PLESSER: You're saying in your default
4 report, you say derived data is not provided?

5 MR. COLE: Yes.

6 DR. CULNAN: That was our point, too.

7 MR. PLESSER: I'm saying I support that
8 approach. I just don't know what derived -- still you
9 have got to define derived data in making that
10 statement meaningful. I support the approach. I think
11 the total approach -- that's why -- one of the reasons
12 why the total approach is problematic. So -- but I'm
13 just making more fine points here that I think there
14 needs to be -- those refinements have to be in there.

15 MR. MEDINE: Rick?

16 MR. LANE: Yes, a point of clarification. When
17 you were talking about having access to information,
18 when something is sent to me from someone, is what I
19 understood, so you mentioned that you could have a pass
20 code so you could have access to that. What
21 information am I accessing, just the information of
22 that book or that product that was sent to me, or all
23 the information that that site has on me from a variety
24 -- you know, from transactions that I have done on the
25 other side?

1 Because if it's all transactions or even other
2 transactions of people that sent it to me, the problem
3 is if I get a book from Amazon that has a pass code on
4 it, what happens if, you know, several -- you know, I
5 throw out the box and I don't realize there's a pass
6 code and someone takes it out of the trash, or I'm out
7 of town for vacation during the summer and someone goes
8 to Amazon, sends me a \$5 book, and then I'm able to
9 access all of the information on that individual,
10 including their credit card numbers, because I have a
11 passcode?

12 So, my question is maybe what information is
13 that third person or that person who got the product,
14 what are they able to access? And maybe I missed
15 something there.

16 DR. CRANOR: Well, I wouldn't try to define it
17 here, but I think, you know, we would come up with
18 something reasonable. I mean, I --

19 MR. WHAM: We want unreasonable rules, come on.

20 DR. CRANOR: -- in the bookseller scenario, I
21 would assume that it would be the information about the
22 gift transaction that is relevant to me. So, the
23 credit card number of the person who sent me the gift
24 is not relevant to me.

25 MS. GAU: No, no no, what if you had purchased

1 from that site and so there's history about you at that
2 site, should your information, in addition to
3 information about being a recipient of a gift from
4 someone, all be in the same file?

5 DR. CRANOR: Well, there are two -- I mean --

6 MR. LANE: I mean, if I have a book that's sent
7 to me, I have all the information really I need, maybe
8 except for the person who sent it to me, but maybe I
9 want to send that anonymously because I -- you know,
10 it's a -- you know --

11 DR. CRANOR: So, if I already have an account
12 with Amazon, then I already know how to access my
13 account with Amazon. If this is setting up a new
14 account with Amazon, I think there's a question of
15 whether you want to link the two accounts automatically
16 or otherwise do something.

17 MR. LANE: So, that's the question. The bottom
18 line thing is why do I need to have access to that
19 information, because all the information -- of a book
20 being sent to me, because all the information is
21 already there? Obviously Amazon has my name, address
22 --

23 DR. CRANOR: But if I've never purchased
24 anything from Amazon, so now they are creating a record
25 on me for the first time, I should have some way to

1 access it. If I'm already a customer, I already have
2 it.

3 MS. MULLIGAN: Maybe they have more
4 information, and this goes to Dan Schutzer's point, is
5 you have to use reasonable authentication for the kind
6 of access. If you are going to provide access to the
7 credit card number on file, no. The book transaction
8 is probably not enough. So, I mean --

9 MR. MEDINE: Okay, I think -- I appreciate the
10 point. We may need to separate access as to what,
11 depending on the context, but again, given the clock,
12 just relatively brief comments.

13 Dan Jaye?

14 MR. JAYE: Okay, very briefly, the first one
15 was on the personally identifiable information
16 definition, we had a discussion about being very crisp
17 on our definitions. One thing I would like to offer up
18 is I think that some language about identifiers that
19 could be used to locate or contact an individual is
20 helpful, because otherwise we deal with types of
21 identifiers that may be used for statistical purposes,
22 they may be unique, but they don't have an ability to
23 be tied back.

24 There is also the use of the term "globally
25 unique ID," that's another term we need to define, and

1 we've taken a stab at that in the past, but
2 particularly the sensitivity there is IDs that have a
3 high risk of being associated with data that can then
4 be used to locate and contact an individual.

5 The second point here is just an aspect of
6 access in terms of data retention. We -- data
7 minimalization has been mentioned in the past. One
8 technique to solve business -- the business need to do
9 fraud detection and auditing is to use samples, so
10 rather than keeping complete log files for everyone
11 forever, you might keep a two-week -- keep log files
12 around from two weeks on a 1 percent random sample of
13 data so that you can look for fraud and spoofing.
14 There's a bunch of reasons why we need to have, for
15 example, network-level information to prove that, for
16 example, robots aren't clicking on ads generating
17 artificial click-through rates, et cetera,
18 and one of the concerns there is consumers -- if you
19 notify consumers and give them notice, saying your
20 information may be retained for two weeks for this
21 purpose, then they're going to say, can I have access
22 to that information?

23 Well, sometimes you can provide it because
24 they're in the sample, and sometimes you can't, and
25 just the ongoing concern consumers might have about,

1 you know, are they just refusing me access or did they
2 really not have it?

3 The third point is there was a point that
4 Deirdre made, and please correct me if I got this
5 wrong, but about self-regulation can't prevent the
6 access to the data by subpoena or law enforcement. I
7 think it was sort of a point to -- to a point that Ted
8 made, and I just wanted to sort of raise the point in
9 general that I'm not sure that legislation does that
10 either and certainly raise the point that many people
11 have considered, which is that big brother -- apologies
12 to government employees -- was not a corporation, was a
13 government institution in Orwell's book, and that
14 legislation might very well carry along with it
15 carve-outs for law enforcement that would actually
16 potentially require customers to keep more data.

17 MS. MULLIGAN: Can I respond to that?

18 Carve-outs would suggest that something now
19 exists, right? It's kind of I had somebody yell at me
20 once saying that I was creating a carve-out for access
21 to medical records by dog catchers as though they had
22 Fourth Amendment protection, which, in fact, they
23 didn't, because the only way you get it is through
24 statutory creation.

25 MR. JAYE: I am not suggesting that you are

1 recommending that.

2 MS. MULLIGAN: No, no, no, what I'm saying is
3 you can only go up from where we are, and the only way
4 to do it is through legislative processes. You cannot
5 say law enforcement, you need a warrant to get access
6 to this data, if statutorily they don't -- I mean, BBB
7 Online can do a lot of things. They can't do this.

8 MR. COLE: And nor are we seeking to.

9 MR. MEDINE: Okay, I --

10 MR. JAYE: I think I was making a different
11 point, but I'll table it for now.

12 And then the last point is related to this
13 issue about the third -- another consumer forwarding on
14 data -- basically providing data about another consumer
15 and the issues of notice. I just want to run out a
16 scenario that if you make an online purchase today, for
17 many, many merchants, if you want to ship it as a gift
18 to a third party, you actually have to call up the
19 credit card company and give the name and address of
20 the recipient to the -- have it on file at the credit
21 card company so that it can be verified, and I just
22 want to raise that as an additional issue of how do you
23 provide notice and access in that case to the third
24 party.

25 DR. LANCE HOFFMAN: Can you go through the --

1 MR. MEDINE: I am going to arbitrarily break at
2 12:15, and then we can resume with whatever flags are
3 up, if you want to discuss --

4 DR. LANCE HOFFMAN: Offline.

5 MR. MEDINE: Offline, okay.

6 Josh?

7 MR. ISAY: Josh Isay.

8 I would like to raise an element that only
9 seems to be in the case-by-case approach, which is the
10 likely use of the information, which has not been
11 discussed yet, and I think after lunch I'd love it if
12 we could go back and talk about it, because it seems to
13 me that we do hold different standards for different
14 uses of information. I mean, consumer credit
15 information, we have different access and correction
16 requirements, and I think that has to be true in the
17 online world, as well, and I just think it's an
18 important issue that we go back and talk about consumer
19 credit information and health information after the
20 break, because I think that does change the access --
21 it can change the access requirements.

22 MR. MEDINE: Okay.

23 Lance?

24 DR. LANCE HOFFMAN: Lance Hoffman.

25 You'll be happy to know this is not going to be

1 substantive but more on process, and it will be brief.

2 I -- this discussion today has to me at least
3 been so far the best of all of the discussions and the
4 meetings we have had. An awful lot of good information
5 has come out, and I am sort of looking forward to and
6 also cringing at the same time at what we have to do
7 with this and whatever is going to transpire in the
8 afternoon.

9 It strikes me, and I would like to get some
10 guidance from the chair, David, before we break for
11 lunch, in essence, in some manner, this committee is
12 going to have to merge the so-called lightly edited
13 draft, okay, with at least points that have been
14 brought up in today's transcript, possibly also with
15 the so-called preface or so-called summary, but that's
16 all up in the air right now, that we started talking
17 about this morning, and put all those together into a
18 -- a revision of the draft report, which presumably
19 will have a short executive summary with it.

20 That's going to be a major effort. Having done
21 that, we're not done yet. Having done that, that is
22 going get e-mailed or distributed to the committee
23 members. Comments will be made by the members of this
24 committee -- this is all in a very short time frame --
25 and the -- let me call it a drafting committee will

1 then have to go and do redrafts or accept and reject
2 certain of these comments and objections and whatever,
3 send out the final report -- and tell me if I'm getting
4 this wrong -- send out the draft final report so that
5 people can, if they wish, put in any additional
6 comments or dissents, to then go all in one nice, neat
7 package to the Commission.

8 Do I have this right so far?

9 MR. MEDINE: You do.

10 MS. GAU: With an e-mail vote.

11 DR. LANCE HOFFMAN: With an e-mail vote. So, I
12 want to ask -- speak to this, please, before lunch.

13 MR. MEDINE: I don't want to spoil your
14 digestion. I guess what I would say is let's all take
15 out our calendars during lunch and consider how we can
16 achieve all those goals within the time frame that's
17 required, which is a report to the Commission by the
18 15th.

19 I would also follow up on an earlier suggestion
20 that if groups want to maybe nominate two people from
21 each group to be part of some drafting process so that
22 each of the groups has representation, you might
23 confer among yourselves and nominate two of your
24 members to join with the drafting group so that you
25 make sure that your views are represented in the

1 revisions to this effort. I think that would be
2 helpful to have a broader representation as we move
3 forward, but I think why don't we come back and try to
4 look at our calendars and figure out how we can
5 accomplish all of these tasks.

6 DR. LANCE HOFFMAN: Is that a fixed deadline?

7 MR. MEDINE: Yes.

8 (Whereupon, at 12:15 p.m., a lunch recess was
9 taken.)

10 (Whereupon, there was a change in court
11 reporters.)

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AFTERNOON SESSION

(1:35 p.m.)

MR. MEDINE: We had a couple people that had flags left standing as we broke for lunch, some of whom may be here. If we could -- thank you.

I would like to try to closeout -- we have basically two more areas to cover. One is the entities discussion under access, and then security plus whatever remaining comments we have on the initial discussion, and again we're going to be under the gun in terms of getting -- not mentioning having to reserve some time to discuss the mechanics of the report. We're going to keep comments briefly focused to get through a fairly hefty agenda.

Let me also note that Art Sackler is here for the record.

MR. SACKLER: Thank you, David.

MR. MEDINE: And he was here before the break, just for the record. Rob?

MR. GOLDMAN: Rob Goldman, Dash.com, two quick points. One was on derived data. These both came from the end of -- just before the break. One was on derived data, and I think we haven't made a distinction in the room, and it would be a good idea to do so maybe in the document between factual derived data and nonfactual derived

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1 data. Facts that are corrected are facts. We can make
2 the inferences that are basically just aggregations,
3 summations, counting, various mathematical operations on
4 facts, and those remain facts.

5 But as soon as you make an inference that is an
6 opinion, I think it's a different kind of derived data
7 that should be treated differently on the two by two or
8 what's probably rapidly is becoming 16 by 32.

9 The other is on sampling which Dan raised
10 quickly, and something that we've looked at quite a bit
11 and decided against, and the reason we decided against
12 sampling, and I think many of the companies in the room
13 probably have taken the same tact, is that it doesn't
14 work well in an environment that is a one to one
15 marketing environment.

16 So it works fine for things along the lines of
17 auditing and general high level information but, if
18 you're trying to do one to one work, sampling just
19 doesn't work.

20 MR. MEDINE: Thank you. Deirdre?

21 MS. MULLIGAN: I actually just wanted to go back
22 to a point that I made earlier about my sense in talking
23 to several people who are actually on the initial access
24 one subgroup was that -- and it certainly I think has
25 come out around the table, there seems to be kind of a

1 majority of opinion that favors the option one.

2 I'm not certain, but that's certainly a lot of
3 what I hear around the table, and that's what I heard
4 from people who are actually in that working group, and
5 I myself lean towards favoring that because I think it
6 represents the notion that access is yes, and then there
7 may be some reasons why we say no.

8 But I just want to say again that I really would
9 only be able to think that that was appropriate if it
10 reflected the notion that identifiers which make things
11 retrievable in the ordinary course of business, while
12 they may not have a name and address on them, are still
13 things that we want to consider access to subject to
14 some of the limitations that we might find in the
15 authentication area.

16 And I don't think that's reflected there now,
17 and I really would like it to be reflected, and I'm
18 interested in other people's opinions about that.

19 MR. MEDINE: Turning that around, how does that
20 impact non personally identifiable information in terms
21 of access?

22 MS. MULLIGAN: The notion of non personally
23 identifiable is a very slippery term. I mean, I can
24 talk about, for example, if I say we have information
25 that has been compiled about your use of a service but I

1 don't have your name attached to it but in fact you're
2 the only person that has gone to those six web sites and
3 we're using all this data to make decisions about you
4 where quote, unquote, when you come to the web site,
5 we're changing the experience -- we're contacting you
6 with different ads, if you want to use the word
7 contact.

8 I don't necessarily know that that's the right
9 term, but to push a little in the direction that Dan was
10 suggesting, we're contacting you. We may not be sending
11 it through the mail, but we're sending it to your
12 identifier. We're sending you a different message.
13 We're contacting you with different content. We can
14 contact you. We can profile you and contact you because
15 we have this identifier.

16 In the offline world it would be your name and
17 your address that we would need to do this. In the
18 online world, we're using this profile that's attached
19 to a global unique identifier, a consistent identifier,
20 a persistent identifier, and if we knew it was you, we
21 certainly have a file that we use in our routine,
22 ordinary course of business associated with this
23 identifier, here's the data.

24 And I don't want to suggest that the name is the
25 magic thing that makes that data important. It's being

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1 used to make substantive decisions perhaps. Dan
2 certainly thinks there's some reasonable things one
3 could do, and I don't want to create this bright line
4 that says only if it has a name, address or email
5 address.

6 MR. SCHUTZER: I would support that notion.

7 MR. MEDINE: Let me just respond to that.

8 Dan?

9 MR. SCHUTZER: Would you mean, let's say, for
10 example, a lot of us have fixed IP addresses, for
11 example. So if I have an IP address, you know who I
12 am. You don't necessarily know my name and address. Is
13 that your point?

14 MS. MULLIGAN: Yes.

15 MR. SCHUTZER: And you can also communicate back
16 to me that way, so I would support that notion that a
17 PII could be something like that.

18 MR. JAYE: I just want to clarify the
19 definition. When I use the term contact it means I at
20 any given time can send a message to you at a time that
21 I choose, so I specifically do not include that at the
22 time you visit a web site that a web site can recognize
23 that you are a repeat visitor.

24 That is not considered at least in my intent of
25 using that definition, just so that my definition isn't

1 used in a different way, to be counted as a contact.
2 Contact would be I can send a message to you because you
3 have a fixed IP address. I can send a message
4 to you because you have some sort of contact mechanism
5 like an anonymous email address.

6 MS. MULLIGAN: For you it turns on whether it's
7 push or pull?

8 MR. JAYE: Yes. It depends on whether it's
9 active or passive.

10 MS. MULLIGAN: I've seen them both as active.
11 It's very clearly a push or a pull.

12 MR. JAYE: It's whether or not the company can
13 interrupt the consumer with something that they didn't
14 ask for as opposed to -- with something different than
15 what they would see otherwise, so in the case of an ad
16 on the page, they would see an ad on the page no matter
17 what.

18 The ad is merely relevant to them. It's very
19 different than I stuck a message in your in-box.

20 MS. MULLIGAN: I think you're right. There may
21 be differences on how intrusive is it on my privacy, but
22 it doesn't change the calculus of you're using the data,
23 you're using the data to change my experience, to change
24 what I get. The data is associated with me in some way,
25 shape or form.

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1 MR. JAYE: Absolutely. It affects the
2 experience of the computer visiting the site. I wanted
3 to clarify the definition of contact that I was giving.

4 MR. SCHUTZER: I would say your example is more
5 intrusive your way. I mean, in other words if you give
6 me an email, I can build a filter and eliminate all
7 that stuff or put in a special folder, but if you're
8 going to hit me with a banner ad that I don't want,
9 that's going to slow my experience and be a pain in the
10 butt, and I really don't want that?

11 MR. WHAM: You're going to get a banner anyway.
12 It's just a question of which banner.

13 MR. SCHUTZER: Well, no. I might get a lot more
14 with my IP address if they find that I'm a good target
15 for more things, so I may find that more intrusive.

16 MR. MEDINE: David.

17 MR. DAVID HOFFMAN: David Hoffman from Intel. I
18 just have a question for Deirdre. I'm a little confused
19 by the language, first off that we say because you might
20 have a local identifier I know that it's you, and I
21 don't think we know that. I think we know it's the
22 machine or you know it's the browser which creates all
23 the problems, and that problem is in the draft in
24 different places.

25 And because of that I feel there's a lot less

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1 harm that could ever potentially come to a user based on
2 the information that could be collected because they can
3 always change that. It can't be tracked back to me as
4 an individual because I can always delete the local
5 identifier in my browser, start over and not have to
6 worry about it, so the question I have for you is, could
7 you talk a little bit about the kind of harm that you're
8 trying to prevent.

9 MS. MULLIGAN: We can talk about harm if that's
10 part of what's useful for the discussion. I'm actually
11 trying to talk about access, but I'll give you an
12 example. You said this would be less harmful than other
13 things, and in fact the overbreadth of the potential
14 collection is in fact what makes it more harmful.

15 There's an example, I know people this has
16 happened to. They share a computer with a coworker, a
17 family member, et cetera. They are researching
18 something dealing with sexual orientation or some other
19 issues, and all of a sudden the ads reflect something
20 that indicates something perhaps about the person who
21 was browsing.

22 MR. DAVID HOFFMAN: So if they delete the
23 identifier, then the harm is solved, right?

24 MS. MULLIGAN: Well, you're presuming the
25 individuals know they can delete the identifiers, and

1 that is a pretty big assumption from most people's
2 experiences on the web, and all identifiers are not
3 possible to delete on my side. I mean, there are
4 different issues here. Dan probably is not free to
5 change his IP address.

6 MR. SCHUTZER: Yeah, trying to change your fixed
7 IP is not going to be so easy.

8 MR. DAVID HOFFMAN: To take care of your
9 concerns, if it was split to talk about the kinds of
10 identifiers that you can either change or opt out of
11 providing and have a true choice and we were able to
12 educate consumers so that they knew how to do that and
13 what that was about, then have we solved -- you said
14 you're not talking about harm. You're talking about
15 access, but I thought the whole reason we were talking
16 about access was to prevent harm to consumers so that
17 confused me.

18 MS. MULLIGAN: No. I mean, the access
19 discussion is not premised on harm other than the notion
20 of how we protect privacy. Part of it is transparency
21 and allowing people to understand what data is being
22 collected and processed about them.

23 MR. MEDINE: Ron?

24 MR. PLESSER: A technical point being here on
25 behalf of CIX. IP addresses are almost always

1 dynamic.

2 (Chorus of nos.)

3 MR. SCHUTZER: Incorrect.

4 MS. MULLIGAN: They're becoming more and more--

5 MR. MEDINE: DSL and cable modems use fixed IP
6 addresses.

7 MR. PLESSER: I get a different answer every
8 time I ask that question. I think mainly if you had
9 ISPs here, they would tell you that they are dynamic and
10 that they change.

11 MR. WADLOW: I'm sorry, Ron. I am an ISP and
12 they are not dynamic. Many individuals --

13 MR. PLESSER: We're talking different language.

14 MS. MULLIGAN: It depends. It varies highly.

15 MR. MEDINE: Okay.

16 (Discussion off the record.)

17 MS. MULLIGAN: Can I finish responding to the
18 question?

19 MR. MEDINE: Let's have a quick close out
20 because we need to move on to the entities discussion.
21 Deirdre and then Jane.

22 MS. MULLIGAN: I think the presumption in the
23 default one is if something is retrievable, right, in
24 the normal course of business and then there's this
25 question about whether or not it's personal, and my

1 argument I guess is that information that's being used
2 to make decisions about people is archived in a way that
3 it is identified as a specific -- it may be a computer,
4 the same way it may be my phone, but we all know that my
5 phone number and me are fairly tied, my IP address and
6 me are fairly tied, a unique identifier that's assigned
7 to me could be tied, that there may be reasons why we
8 say no because there may actually be information about
9 six people and therefore we're going to mitigate on the
10 access, but that we don't create an assumption that that
11 data is never accessible which is what this does right
12 now.

13 MR. MEDINE: This may be room for two more boxes
14 on the chart for identifiable, unidentifiable. Jane?

15 MS. SWIFT: Which is actually a good segue for
16 me. First of all, just on a procedural thing, I think I
17 understand people wanting to change the titles, but I do
18 think there's some value in having a title to each of
19 these approaches beyond option 1, option 2, option 3
20 which is much more difficult to sort of understand what
21 we're talking about. It's just the way that people who
22 operate in words and not numbers communicate.

23 Secondly, in our access two subcommittee earlier,
24 we had done a whole list and attempted to do a list that
25 then got taken out just of definitions, and I'm thinking

1 that one of the things that might help us to get to the
2 end of this process is a lot of the discussion we're
3 having is on using consistently the same words for the
4 same definition and agreeing on definitions.

5 And that to me may be something that we could
6 all come to closure on through email in the intervening
7 time, and then it could be edited in a way that I think
8 achieves something, so I would just put that out as
9 perhaps a task to be accomplished that would help to us
10 save time.

11 My last point which gets to yours is we talk
12 about option one default rule, and everyone starts to
13 talk about under which circumstances they would find
14 that to be the most preferable approach. I'm not -- I
15 hope this doesn't bring us back to where we started, but
16 that was the thought between case by case is that the
17 subgroup I believe recognized that in an attempt to have
18 an approach with relative simplicity that you would
19 leave some things undefined.

20 We did pick the term ordinary course of doing
21 business because it does have as I think Jim pointed out
22 very well before the break some legal, some definitional
23 and some sort of general understanding. We didn't get
24 into derived versus -- we limited what was information,
25 didn't get into global and unique identifiers, limited

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1 what we thought of as information as well.

2 Because of this reason, when you start to talk
3 about the cases under which you would want unique
4 identifiers, for example, to then be access to data is
5 not all the time. Even in the cases, it is, well, if it
6 was used for X or if it was information about my sexual
7 status or preferences, then it would be. That starts to
8 bring in a complexity that says sensitivity actually is
9 what defines whether or not a particular type of
10 information may be or might not be utilized.

11 All I'm saying is that, well, undefined I think
12 some of the folks around the table who want to make
13 option one default rule exactly what they want perhaps
14 should engage in a debate. I'm trying to get more
15 clarification for case by case because I think there was
16 a real intent, and I recognize that may draw away from
17 the general support for option one, to leave some things
18 in broad definitions to do a sort of thing that we
19 thought was workable, but that was also understandable
20 and simple enough to be implemented.

21 MR. MEDINE: Thanks. I would like to again
22 because of the clock to move to the entities discussion,
23 and perhaps someone from the entities group could
24 help -- also one quick style suggestion is try to
25 transform some of these questions into options just to

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1 be consistent with the other sections of the report.

2 I know we're all trying to blend it into a
3 cohesive document, but that might be a useful way to
4 just make it appear similar to the other discussions,
5 but there seem to be three entities that are discussed
6 in terms of -- and it might be useful perhaps if maybe
7 someone in the group might be able to walk us through
8 what their thoughts were on those divisions or what the
9 consequences would be.

10 MR. WHAM: May I make one quick access thought?
11 In terms of access it would be useful, and I don't know
12 what people think about this, if access were limited to
13 being able to provide access in an online method. There
14 was a lot of discussion about batch processes versus
15 real time processes, but even batch allow us to come
16 back via email as opposed to requiring snail mail,
17 although there may be an enfranchisement issue around
18 that.

19 Because we're talking about online data
20 presumably everybody has online access and it's a lot
21 less costly to be able to send something back email
22 than packing it up in an envelope so avoiding any
23 requirement on the government level for offline
24 response.

25 MR. CERASALE: David, mine's been up for quite a

1 while, even before lunch.

2 MR. MEDINE: Sorry.

3 MR. CERASALE: Because I don't want to interrupt
4 the entity discussion. I have just a couple, some of
5 them are fairly specific. I raised last meeting the
6 idea of what if there is no data held and you get an
7 awful lot of questions about that, and I can envision an
8 individual trying to get every dot.com to show me the
9 data you have, and we do have in the access discussion
10 costs and whether you should charge someone or not.

11 I think we really have to consider whether or
12 not someone sends around in a sense fraudulent or
13 harassing -- not fraudulent, harassing requests that
14 there should be some form of required payment of them.

15 That would mean if you don't have any data in a
16 certain place and you get inundated with a lot of
17 requests, that costs a lot of money to respond, to
18 actually be of something added here.

19 The other is I really hope that we do go to the
20 definitions because no offense to my fellow Cape Cod
21 house owner next to me here.

22 MR. CATE: : Are you about to offend me?

23 MR. CERASALE: Yes, I am. He has a statement in
24 here that is quoted. It's not something we put
25 together, it's something that's quoted. He's saying

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1 that date of birth by itself is personally identifiable

2 Well, I can give you a whole series of dates of
3 birth, and you may or may not know whether one of them
4 is mine, it doesn't tell you a darn thing about who I
5 am, so I think that we want to make sure we define what
6 PIT is here.

7 The other is I really hope, Jane, that we try
8 and find another name for prospect since it has another
9 definition outside, and I'll try to think of some word
10 to help you.

11 The other -- I want to go to page 1, actually
12 page 2, which is the access, number two access, and I
13 want to raise these issues because I think this section,
14 the initial section before any of the options, is
15 basically a general statement section, and as we go down
16 to the one, two, three, four, fifth paragraph where a
17 decision has been made to extend access rights, we talk
18 specifically about rights here in the access discussion.

19 And if you want to do that, that's fine, in pros
20 and cons, but I don't think that I would like to have
21 rights put in here. You can say where decision is made
22 to extend access to a consumer. You don't have to say
23 rights or something like that. I would hope in any
24 place that it's not talking about pros and cons, that
25 the word rights be removed because I don't think there's

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1 a consensus that it's a fundamental right.

2 The paragraph right before that, the last
3 sentence, discusses raising additional authentication
4 problems for data that is not -- that have a unique
5 identifier or a browser identification and so forth. I
6 would like to add in there, it's not just raising
7 additional authentication concerns but also additional
8 privacy concerns to allow access there.

9 Now I would like to, if we can, turn to page 8
10 which is the first section on B, total access approach.
11 I want to ask a question. In the second -- let me find
12 it here, in the second paragraph where we talk about
13 consumer costs, it's the paragraph that goes "this
14 approach," if you go down one, two, three, four, five
15 lines, consumers would also experience additional costs
16 such as pass through costs for system upgrades, new
17 personnel, et cetera and so forth.

18 I would like, if we can, to add something in
19 there that says they're going to face higher prices for
20 goods and services for all consumers to provide access
21 for those consumers who request it or something along
22 that line. I think this report needs to show that the
23 access costs are going to go on all consumers, not just
24 those consumers who want it.

25 And I think one final statement, the general

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1 statement I've said many times before, on uses of data
2 versus access. I think there's a huge difference in the
3 use of data and what we should do in access and how you
4 should do it with any cost benefit equation for data
5 that's used to determine the eligibility for a product
6 or service, whether or not you're eligible to receive it
7 versus data that's used to determine whether or not a
8 business is going to expend its resources to offer a
9 good or service directly to you.

10 I think it's a huge difference, and it's in the
11 approach here. It's in a couple things, but I wanted to
12 really emphasize that because it's a major difference.
13 Deirdre, you talk about you're making choices, and that
14 puts all of it together. The choice of whether or not
15 to send you an ad is very different of whether or not
16 you can buy this product.

17 MR. SCHUTZER: What if the ad had discounts?

18 MR. CERASALE: Pardon?

19 MR. SCHUTZER: What if the ad came with
20 discounts or some kind of a feed-in teaser, I don't get
21 it and you get it.

22 MR. WHAM: You do that all the time, all day
23 long you're --

24 MR. SCHUTZER: Does it have the relationship of
25 eligibility in a sense?

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1 MR. WHAM: All I'm suggesting is that there is
2 not a business representative at this table that does
3 not use price discrimination.

4 MR. SCHUTZER: Of course.

5 MR. WHAM: Price discrimination is economically
6 efficient.

7 MS. MULLIGAN: The only question is whether or
8 not --

9 MR. MEDINE: The question is should you have
10 access to information that leads to the decision to
11 choose different prices.

12 MR. WHAM: The answer is you look at what the
13 analog is in the non online business where there is
14 absolutely no requirement for that in any sector that
15 I'm aware of in American business. Where is it that I
16 am told as a customer of Nordstrom that I'm supposed to
17 get the same offer that you are, David, or that I have
18 any right to know what the offer is?

19 MS. MULLIGAN: If all we were going to do is to
20 figure out what had happened in the offline world and how
21 to apply it, we can go home. I can tell you there are
22 very few access rights. There are some laws that
23 require it, and very few businesses provide it other
24 than what's legally required.

25 I don't view that as my task, to import the

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1 offline environment into the online. If anything, I
2 would hope that the rules that are developed here in
3 what I view is a very forward looking segment of the
4 business community would help inform what the rest of
5 the business community does.

6 MR. WHAM: A lot of what that has in practice is
7 that that means that you take an emerging not clearly
8 economically viable in all of its business models and you
9 overlay a higher standard of performance than you do for
10 a non online business model.

11 You take CD Now with a stock trading at about \$2
12 because they can't figure out how to make a buck and you
13 look at it and you say, You now have to tell all your
14 customers why you get a 10 percent off deal and somebody
15 else gets a 20 percent off deal, and let me tell you,
16 the customer that gets the 10 percent off is going to
17 want the 20 percent off.

18 And you're going to remove in practice that
19 company's ability to offer a differentiated price out
20 there, and that does not serve the interest of the
21 business certainly. I don't believe that in the end it
22 will serve the interest of the consumer because you're
23 going to end up with least common denominator offerings,
24 and it doesn't serve the interest of the economy as a
25 whole. It's a bad thing to do.

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1 MR. MEDINE: Let me call on Josh and then
2 Jonathan, and let me just say to those who are in the
3 entities group, we're eating into your time so if you
4 want to have your say in the open session, you're going
5 to have to weigh in on entities issues.

6 MR. ISAY: It's the fundamental flaw of the
7 default rule which is that the scope of access does not
8 take into account the type of information that's
9 collected and the possible harm that it may cause. Do
10 people here think that the access should be the same for
11 consumer credit information as it should be for the
12 number of white socks that someone bought?

13 MS. MULLIGAN: I think the question was best
14 posed by Steve Cole. The question is, do you start with
15 a presumption of access and then a business has a
16 responsibility to say, no, there were reasons that
17 mitigate against access, or do you start where I think
18 Josh, you would like to start, which is the presumption,
19 consumer, unless you can prove harm, you don't get
20 access.

21 And I think my overall agreement is that I would
22 like to start where Steve has put it, not in the I have
23 to prove harm in order to get access because that's not
24 a robust access principle.

25 MR. ISAY: Yeah, but the bottom line is we do

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1 have in the offline world different levels of access for
2 different types of information. It is a commonly
3 accepted sliding scale that we have in the offline
4 world. Are we saying that that sliding scale should not
5 be applied to the online world that it is in the offline
6 world? It doesn't seem to make much --

7 MS. MULLIGAN: I don't think we're trying
8 to undo medical rules, financial rules, credit rules
9 at all. I think we're looking at an area where right
10 now there are very few rules and saying we've
11 identified this, FTC's identified this, BBBOnline,
12 TRUSTe.

13 MR. ISAY: But should consumer's right to access
14 for their health records be the same as -- should their
15 health records --

16 MS. MULLIGAN: Their health records aren't on
17 the table right now.

18 MR. ISAY: -- be the same as they are for the number
19 of white socks that you have bought from a store?

20 MS. MULLIGAN: I think --

21 MR. TORRES: If you're collecting information
22 about how many white socks I buy, what's the harm in
23 telling me you're collecting that information?

24 MR. ISAY: It goes to cost --

25 MR. TORRES: Do I need to see that, I mean --

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1 MR. ISAY: It goes to the cost benefit to
2 business and consumers. That's what --

3 MR. TORRES: Nobody's twisting businesses' arm in
4 forcing you to collect this information in the first
5 place, to the extent that you package it up and sell it
6 or share it with other entities with or without my
7 knowledge or consent, and then to turn around and say,
8 Well, gee, we don't know if we can provide this to you
9 because the cost is too much for us, to do that or to
10 even tell you about it just doesn't get us anywhere.

11 I mean, I agree that we need to be reasonable
12 about how we approach this, but to throw in a red
13 herring about, Oh, this is going to be at undue cost we
14 can't share it with you but we can share it with
15 everybody else in the world or we're concerned about
16 your privacy and I'm glad to see so many people sitting
17 around the table all of a sudden concerned with
18 customers' privacy, to say that we can't provide you
19 access because of privacy concerns, tell that to
20 consumers out in California and in Minnesota who had
21 their privacy violated by financial institutions instead
22 of protecting that same information.

23 Like I said, I want to be reasonable about
24 things, and I agree that cost is a concern, but at the
25 same time don't use that as an excuse not to provide

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1 access to accounts with consumers.

2 MR. COLE: Can I ask a procedural question to
3 maybe help you get to what you want to get to? This is
4 really interesting, and I made a list of things I would
5 respond to if it was appropriate to do that now, and if
6 you tell me it is, I will, but does it matter? Does it
7 matter?

8 Haven't we all agreed that various options and
9 differences of opinion will be in this report. David
10 knows I've had some misgivings about that, but that's
11 what we've all agreed we're doing, so we know now there
12 are different -- we've known it for hours that there are
13 difference points of view here, so let's get all those
14 points of view in the report and move on.

15 MR. MEDINE: And I think in part as we go on I
16 think there are some new points that have emerged in
17 response to the draft that will make the report a full
18 reflection of a variety of views.

19 MR. COLE: Oh, absolutely.

20 MR. MEDINE: And I think that is really the most
21 helpful. These are obviously issues as today suggests
22 that we can continue to debate for an extended period of
23 time and discuss, but obviously we have a very focusing
24 event coming up which is completion of this report.

25 And I think it has been -- I think it's been

1 valuable in terms of going through these various
2 sections to have new issues emerge that people felt
3 should be in the report that weren't in the report, and
4 that was really the goal here is to have a smaller group
5 prepare a report and have the larger group comment and
6 say their views ought to be reflected and are not
7 currently or the report got it right or whatever.

8 And so I think we're proceeding, but
9 unfortunately we also have a time constraint, and right
10 now again I want to reiterate we're eating into the
11 entities group time, which is fine, but we do need to
12 reserve some time for security, obviously a very
13 significant component of that, so I think it was a
14 helpful discussion.

15 And now I'll call on Jonathan and again we'll
16 see if we want to skip entities and move into security
17 because people feel that that adequately states their
18 concern, that's fine, we can do that, but I want to
19 reserve a sufficient amount of time for the security
20 discussion.

21 Jonathan?

22 MR. JONATHAN SMITH: I would just like to note, as
23 numbers and not words person, I did a quick calculation
24 that I think illustrates the difference between online
25 and offline for Ted, and here's what I calculated,

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1 okay? If I remember correctly from the news report, the
2 CD Now incident was 300,000 credit card numbers.

3 MR. WHAM: Wrong company. Wrong company. My
4 example was not CD Now. I was just suggesting that CD
5 Now uses price discrimination, which they may or may not
6 do.

7 MR. JONATHAN SMITH: Okay. Well, somebody
8 someone lost 300,000 credit card numbers. At 60 lines
9 per page that's 5,000 pages. Controlling that
10 information generally would cause a hernia for most
11 people, okay, and so I think the differences, the point
12 that I made in the last meeting which is Moore's law
13 which is the cost and ease of moving that information in
14 the online world is very, very different, and I think
15 that's the source of concern.

16 MR. MEDINE: I'm going to give entities one more
17 chance. Then it's going to be going, going gone on
18 entities. Dave?

19 MR. DAVID HOFFMAN: I was going to give a brief
20 download of our entities work, I think very brief
21 because I actually don't think -- I think there's a lot
22 of disagreement but I don't think where we ended up
23 there was much disagreement on the range of options that
24 we ended with, and there was a lot of commentary in the
25 end of our draft.

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1 So I would just want to provide a brief summary,
2 especially of the three different options we ended up
3 with on entities, and if I could figure out which pages
4 of which drafts everybody is looking at, I would give
5 you a page, but at least on mine it's 7.

6 MR. SCHUTZER: It's 17.

7 MR. DAVID HOFFMAN: I would also say then since
8 we did have a high amount of disagreement on our
9 committee, there may be others on our committee who will
10 want to come in and give some comments after I talk.

11 The three different options, and these need to
12 be cleaned up, but the first one really goes to just the
13 fact that the entity collecting the information from the
14 individual would have to give access, and it would only
15 be those entities that actively maintain the data that
16 is linked and associated with individual consumers or
17 consumer households. That was one option. At least we
18 thought these were in sort of a spectrum.

19 The second option was instead of talking about
20 just the entity that's collecting the data, it was the
21 entity the consumer reasonably believes is the data
22 collector, and the differentiating factor we thought
23 there was we will have a number of situations where it
24 may be actually another company that's actually doing
25 the physical collecting, but the consumer actually

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1 believes that it's the branded entity that they're
2 discussing.

3 So they may actually contact that branded
4 entity. They may not have really collected it, but they
5 should be able to get access from the people that they
6 think they're giving it to.

7 MR. MEDINE: Can you give a real world example
8 of that, not necessarily identifying a company name, but
9 a context in which that may arise?

10 MR. DAVID HOFFMAN: I'm more than willing to
11 avoid giving names, which I think we all should do start
12 doing, although we only have a few hours left to comply
13 with that.

14 A data hosting situation potentially where a
15 data hosting company may be actually managing the
16 application, the web site that collects the names, but
17 they're actually -- they're actually not the ones that
18 are branding it, is that they're actually branding it as
19 another entity that's hired them to do that.

20 MR. MEDINE: So a consumer would reasonably
21 think it was the other entity that was collecting the
22 information and not the hosting company.

23 MR. DAVID HOFFMAN: Right, so they wouldn't call
24 the hosting company if they wanted to get access. They
25 would call the company.

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1 The other situation that we wanted to call out
2 there would be to separate from -- in large corporations
3 you could easily have as far as the definition of the
4 entity just a subset of the entity. It could be an
5 individual brand, if it's a brand management type
6 company, or it could be an individual service within
7 that large corporation.

8 They would contact that individual part of the
9 corporation, not believe that they could call anywhere
10 within that corporation and expect to get access, so
11 those were the two points I believe we were trying to go
12 for there.

13 We then said -- and this goes to the data
14 hosting situation that you should be -- if that entity
15 is using an agent, and we talked about this the last
16 time we got together, the difference between an agent
17 and a third party, that that agent then should be
18 required to give access as long as that agent, and the
19 definition of agent being the restriction on the use or
20 further transfer of the data, so there's a variety of
21 different agencies you can think of, including some of
22 the shipping companies of potentially doing fulfillment
23 of goods.

24 And then we -- the second option assumed that
25 what you could take care of, and this was hotly debated

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1 in our group, that other third parties and this whole
2 idea we talked about during the last meeting of the
3 chain of trust, that you could contact one company.
4 They would have to contact everybody they had sent the
5 information to, who then would have to contact everybody
6 they had sent the information to to give access back.

7 The idea here being that -- several members of
8 our committee thought that that was unworkable, although
9 several also thought that that should work, so we built
10 in an option saying, Hey, in that situation just
11 notice. You put on the online service that the
12 information is going to be transmitted to
13 third-parties. If people don't want that to happen,
14 they choose not to take part in the service.

15 The third option was the inclusive option
16 basically saying the entity that collects it, parents,
17 subsidiaries and other recipients which would include
18 third parties and agents. That's my --

19 MR. MEDINE: What was the group's thinking about or
20 perception of information intermediaries? What types of
21 entities would that cover?

22 MR. DAVID HOFFMAN: Could be an agent or a
23 third-party depending upon the contractual relationship
24 between the information intermediary.

25 MR. MEDINE: And the data collector? There is

1 also presumably information in the intermediary on
2 behalf of consumers.

3 MR. DAVID HOFFMAN: Can you give me an example
4 of that.

5 MR. MEDINE: Well, some of the anonymizer type
6 services, for instance, where I'm acting on behalf of
7 the consumer to interact. Would that --

8 MR. DAVID HOFFMAN: I would assume -- I'm
9 probably not understanding the question. I would assume
10 an anonymizer in that situation --

11 MR. MEDINE: Would have access obligations?

12 MR. DAVID HOFFMAN: Yes, would have access
13 obligations.

14 MR. MEDINE: And likewise, another situation
15 that you're concerned about information the intermediary
16 would have and the data collector would also have access
17 requirements under the third option?

18 MR. DAVID HOFFMAN: Yes, if they're acting --
19 I'm assuming by information intermediary you mean
20 someone generally that the consumer or the data subject
21 would not have knowledge would actually be getting --
22 would actually have the data and so, yeah, I would.

23 MR. MEDINE: Greg, you wanted to weigh in?

24 MR. DAVID HOFFMAN: Can I just say I wanted to
25 give an opportunity for Andrew or some of the other

1 members of our committee who may have -- or Frank or
2 anybody or Ron who may think I didn't describe that well
3 before.

4 MR. SHEN: No, I think you did a great job of
5 describing that.

6 Actually to get back to your question, David, I
7 think you're referring to infomediaries, and maybe we
8 didn't really do a good job of distinguishing this, but
9 I think when we use the term information intermediary,
10 we're talking about the sort of web hostings, sort of
11 out-sourcing that David Hoffman was talking about.

12 And I think those kinds of situations you're
13 talking about as some sort of third party that I have as
14 a customer or an independent user, an active
15 relationship with those. They hold my data and allow
16 people to see it.

17 MR. MEDINE: Well, I may be evidence of consumer
18 confusion about that point. It might be useful to at
19 least clarify that.

20 MR. DAVID HOFFMAN: That would fall under what
21 we referred to as a data collector because they would be
22 actually collecting the data from the end user, the
23 subject.

24 MR. MEDINE: Do others on the group want to
25 comment? Ron?

1 MR. PLESSER: Well, just everything that Dave
2 said was great except the additional point that's in
3 there is that we did talk about, at least in terms of
4 access, the correction. On the correction stuff there
5 may be certain entities where it's not appropriate to
6 have them do corrections such as public record
7 disseminators, and that was not a consensus but it was
8 an option in there and I just wanted to highlight that.

9 MR. MEDINE: Greg?

10 MR. MILLER: I had a couple comments. One was
11 to mention that the infomediary is typically referred to
12 as broker in the Internet space for clarification.

13 But the other two things were administrative
14 points, one tangentially related to entities, and I'll
15 take that one first. I would like to propose for the
16 record that maybe in our introduction that we note that
17 we respect the reality that there is legislative and
18 regulatory efforts going on underway in various stages
19 of completion with regard to protection specifically of
20 health care information and financial information and
21 that we recognize that there's probably going to be some
22 question about conflict and resolution between different
23 regulatory agents trying to do the same thing but with
24 different conditions and criteria. Health care
25 information in particular has some pretty specific

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1 things underway.

2 The other question I had administration wise is,
3 are we allocating any time in the remaining couple hours
4 here to talk about production and scheduling challenges
5 or shall I say opportunities?

6 MR. MEDINE: I hope so at the end. I think
7 we'll have to reserve a fair amount of time for that.

8 MR. MILLER: I too have been doing some
9 calculation here, and just based on the content, the
10 quantity of content we have today and having been around
11 sort of production schedules before, we've got some
12 serious issues to resolve with what we're trying to
13 accomplish, so...

14 MR. MEDINE: Well, as long as we can move
15 through the other matters, we'll take that up as the
16 last matter but as soon as possible because I think that
17 does raise some significant practical issues.

18 Other comments? Stewart, you have your flag up
19 on entities?

20 MR. BAKER: In the interest of time I withdraw
21 my comments.

22 MR. MEDINE: Other comments on entities, David?
23 Richard?

24 MR. PURCELL: I would just like to ask if
25 there's -- what the subcommittee was -- what were you

1 thinking? What was the discussion around or was there a
2 discussion around entities reporting about other
3 entities?

4 There is a discussion around whether or not
5 entities would forward corrections to other entities
6 that are downstream in a distribution chain which is
7 addressed in here, but what I'm questioning is whether
8 entities should have a role in reporting to which other
9 entities they did distribute data?

10 As an example, I'm on a web site. They say, Can
11 we share your information with third parties. I say,
12 Okay. Do I have access to the list of third parties to
13 whom my data was distributed?

14 MR. DAVID HOFFMAN: Under option 2 that you
15 would be given notice to who those third parties would
16 be.

17 MR. WHAM: Specific firms, specific instances?

18 MR. PURCELL: Right, what I understand your
19 response to be, David, is that in general here is the
20 list of companies to whom we distribute data, but we're
21 not at all sure to whom among this list your data was
22 distributed. I'm just trying to clarify .

23 Let's say I have a serious change I have to make
24 to my data, and I'm not able to have the data collector
25 forward that change down the distribution chain. Am I

1 to be provided a list of companies to whom that
2 erroneous data was distributed so I can individually
3 contact them for the change?

4 MR. DAVID HOFFMAN: I don't think I'm the right
5 person to answer that because I was the person
6 advocating the option that I think that would take care
7 of that so that wouldn't happen because I think that's
8 the sole reason why I think -- I think that's so
9 unworkable.

10 I think notice is the only way to go, and you
11 educate consumers that it's the information -- if
12 they're going to participate with an online service and
13 give them information, that information is going to be
14 disclosed to third parties, that they're not going to be
15 able to propagate corrections or get access to that
16 information then.

17 MR. MEDINE: Does anyone else want to take up
18 that question? Also I just would add in the context of
19 some of the financial and medical regulatory issues
20 there has been at least a view that you don't disclose
21 the specific firms to whom the information is disclosed
22 but the types of firms. That would then make it very
23 difficult to effectuate what you're aiming at.
24 Deirdre?

25 MS. MULLIGAN: Except in the medical context. I

1 mean, it may not be in the privacy rules, but as a
2 physician if you propagated an error, there would be
3 some duty for you to correct it if it was something that
4 was going to impact people in a substantial way and
5 I think that's part of what Richard was getting to.

6 If there is data that is potentially -- it's
7 incorrect and the fact that it's incorrect could lead to
8 some serious ramifications, is there a requirement, and
9 I think this may best fall under what Jerry would call a
10 case by case.

11 You have to look at this, and if you are in the
12 business of transferring data that's going to be used
13 for health care, for example, you better have an audit
14 trail of where you're sending that data because people
15 are going to rely on it, and then if they rely on it
16 inappropriately, you know.

17 MR. DAVID HOFFMAN: One comment on that because
18 the discussion that we had didn't really come out very
19 clearly was that we had concern that even if we gave the
20 ability for consumers to go follow the data, they would
21 never catch up to the data. They would never find all
22 of the places to go to the data, so we thought what's
23 the best way to handle that?

24 The best way to handle that is to educate the
25 consumers not to have given that data in the first place

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1 or have the company control that data by actually --
2 those parties being the agents and contractually
3 committing those parties not to further transfer the
4 data, and then that data collector would have the
5 obligation of going and propagating that correction.

6 MR. SCHUTZER: Let me talk a little bit about
7 it. I think we discussed that at great length. Now,
8 what happens sometimes, I absolutely think you should be
9 telling people who you gave the data to. They in turn
10 may be giving it to if other people. They may in turn
11 not store the data in the same format I gave it to them
12 in.

13 For example, if I buy a list from somebody, I
14 may scrub that list by comparing what other data that I
15 have and correcting things or making inferences based
16 upon it, so it could very well be that although you
17 found an error in the original data, I don't have that
18 error because I corrected it, could be.

19 So rather, we thought that in some cases there
20 were responsible sources, right, that everybody tapped
21 and that were responsible for maintaining things. Like
22 for example in a financial case you might talk about a
23 credit bureau. Certainly you would want to go back to
24 that source and correct that.

25 Now, whether you would be able to practically

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1 propagate would be on a case by case basis, but clearly
2 I think we all agree that to the extent that you can and
3 you have that information available, I should be able to
4 say that, yeah, not only do I share the data with these
5 entities but these are the entities I provided your data
6 to the extent that I have.

7 Now, I might indeed not know who they shared it
8 with. I might not be at all knowledgeable about whether
9 they're storing it or not, so it's their
10 responsibility. Also if they are maintaining data
11 online, they should provide you access to it, and you
12 indeed were going to go and access it and see if they've
13 got it and see if it's a correct thing or if it's
14 erroneous.

15 MR. MEDINE: Frank?

16 MR. TORRES: I think this is one where it is
17 certainly reasonable and this task comes in to play, did
18 I buy six white socks instead of four? Ultimately after
19 I realize that you're collecting that type of
20 information, does it make any difference if I can
21 correct it if it's wrong?

22 MR. WHAM: What about five?

23 MR. TORRES: Then it doesn't become
24 unreasonable, but I think we all have the benefit here
25 of David's other life, and that is one of the leading

1 Fair Credit Reporting Act experts here in Washington,
2 and I think that maybe that could provide some guidance
3 as to what the obligations are of entities that report,
4 merchants that report credit information to bureaus and
5 their obligations to go about correcting it and
6 providing access to that information because that's one
7 area where your credit report is used to make decisions
8 that affect your pocketbook, consumer's pocketbook, how
9 much you pay.

10 And I venture to guess if anyone around the room
11 is buying a house or applying for a credit card, you
12 would want the best rate that you could get, and to get
13 that, you need to make sure that your credit report
14 accurately reflects where you are and if there's any
15 errors in it to be able to get in, see it. If there's
16 errors you would be able to correct it. David and I --

17 MR. MEDINE: Briefly, furnishers of information
18 under the Fair Credit Reporting Act have a duty to
19 correct information and likewise credit bureaus that
20 discover error are obligated to share that information
21 with other credit bureaus.

22 I'll leave it to the group as to whether that's
23 a model that's relevant to your discussions or not, but
24 in that world there is the both sharing and correcting
25 duty under the Fair Credit Reporting Act.

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1 MR. WHAM: But there's not a responsibility to
2 send that to the people you previously sent the credit
3 report to, is there?

4 MR. MEDINE: Well, the consumer can request a
5 credit bureau send an updated corrected report six
6 months back, everyone who received it for credit
7 purposes, and two years back for everyone who received
8 it for employment purposes as a matter of law, also once
9 it's been corrected and updated.

10 MR. TORRES: To bring up a point that Stewart
11 raised at the beginning of this today, this session
12 today where maybe we need to look at cases where the
13 consumer has some benefit, and maybe the higher level of
14 correction falls in those circumstances and a less level
15 of correction falls in other information that might be
16 out there.

17 MR. MEDINE: Dan?

18 MR. GEER: This is very late in the game to ask
19 this question, but let me make sure I understand it.
20 When we talk about information relating to a person,
21 everything here has been in the context of flesh and
22 blood and not a legal person. Am I wrong or am I
23 right?

24 MR. MEDINE: I think we're talking about human
25 being consumers.

1 MR. GEER: Only flesh and blood, but not the
2 legal person, so if, for example, just to make it up, I
3 have another life where I'm incorporated as a whatever,
4 you could not tell the difference between my use of such
5 and such a book store as to whether I was operating as
6 my legal person or as my physical person.

7 I don't know how you're going to get that, get
8 at that, but it just occurred to my all of a sudden,
9 what is the definition of a person. It's a little bit
10 of a problem.

11 MR. MEDINE: I think we've been operating under
12 the flesh and blood person. Obviously sometimes those
13 protections may carry over to non flesh and blood
14 corporate entities, but our clear focus is on people.

15 MR. GEER: Well, the small business entities
16 where you're operating out of your house, and there's
17 lots more now, and the net makes that so, I'm wondering
18 whether we missed something here. This is a non
19 sequitur I admit, but when we're talking about entities
20 here, does the entity thing include legal persons?

21 MR. MEDINE: At least corporations don't buy
22 five pairs of socks so we may be safe there. Other
23 comments about the entities issue?

24 MR. CERASALE: I just had one question to make
25 sure I understand it. Where in this do the deliverers

1 of products, the UPS, the Fed Ex, the Postal Service
2 stand in connection -- one second.

3 I think he mentioned deliverers. Where do they
4 stand in these entities here, UPS, Fed Ex, Postal
5 Service?

6 MR. DAVID HOFFMAN: Generally I believe they
7 would be agents because they would -- part of this would
8 be to drive the obligation on the data collector in
9 their contracts with those companies to make sure that
10 the data is protected by saying that they cannot forward
11 that data on to anybody else or use it for any other
12 purposes.

13 MR. MEDINE: Who would be providing access, the
14 agent, the shipping company, or the data collector?

15 MR. DAVID HOFFMAN: I'm sorry?

16 MR. MEDINE: Is that what you were --

17 MR. CERASALE: Yes, I would like to know. In
18 other words, is it an obligation suddenly of Fed Ex or
19 more problematic of the United States Postal Service to
20 provide access?

21 MR. DAVID HOFFMAN: No, I think that the
22 obligation is on the data collector to make sure that
23 access is provided. Now, the data collector may choose
24 --

25 MR. SCHUTZER: Wait a minute. If I'm a

1 transporter like a UPS and I choose to maintain a
2 database of this information, then I think they should
3 provide access to it. If I'm just maintaining that
4 information to do a service, I don't keep it.

5 But if they're maintaining it online, selling
6 it, using it, then why shouldn't they be?

7 MR. DAVID HOFFMAN: They wouldn't be selling it
8 because they're agents in this example. They would only
9 be using it for the purposes that they were hired for by
10 the data collector. In my opinion the agent could be
11 providing that access directly, but the obligation is on
12 the data collector that if the agent's not doing it, the
13 data collector has to figure out some way to make sure
14 that access is provided.

15 MR. MEDINE: Is that a line that you're drawing
16 as Dan suggested between the agent acting as the agent
17 and when an agent chooses not to act as agent, they then
18 incur other responsibilities?

19 MR. DAVID HOFFMAN: That's right. Then they're
20 a third party.

21 MR. SCHUTZER: Then they're a data collector.

22 MS. MULLIGAN: But shipping companies like UPS,
23 et cetera, are frequently not acting as agents. At
24 least that's been -- Lorrie and I have done a fair
25 amount of research in this area.

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1 MR. DAVID HOFFMAN: Yeah.

2 MS. CRANOR: Often especially if it's a small
3 business, there's no contract between the business and
4 the UPS. You just drop it in the UPS box.

5 MR. COLE: Those are two different points. They
6 may be having no contract, but that doesn't mean they're
7 legally not agents.

8 MR. MILLER: That's correct.

9 MR. COLE: The absence of a contract may mean
10 you don't have an opportunity to create the protections
11 that we're talking about.

12 MR. CERASALE: There's a contract with a tariff
13 agreement. Just dropping and putting money on it,
14 that's a contract. There's a contract with the Postal
15 Service when you put a stamp on it, so it is a contract.

16 MS. CRANOR: It still happens that there is no
17 privacy policy associated with that contract.

18 MR. CERASALE: That's correct.

19 MR. SCHUTZER: I would say --

20 MS. MULLIGAN: Within that context there is no
21 agent contracting relationship.

22 MR. SCHUTZER: If they're just using the
23 information to deliver the mail, and that's it, that's
24 one thing.

25 MS. MULLIGAN: They're not.

1 MS. CRANOR: They're not.

2 MR. SCHUTZER: If they're using the information
3 to maintain and create a database, then they're
4 collecting it.

5 MS. CRANOR: Yes, that's what they're doing.

6 MR. MEDINE: It's not so much in terms of the
7 contract as their practices in determining of how they
8 handle the data.

9 MR. GEER: So if I don't explicitly throw it
10 away then I'm a collector.

11 MR. SCHUTZER: Well, if I keep it --

12 MR. GEER: That's where this deal.

13 MR. SCHUTZER: If I make a record in case you
14 want to trace it that's one thing, but if I actually
15 create a database, that's another thing.

16 MR. GEER: I create a database for the three
17 days it takes me to deliver the package. I never delete
18 the data because it's more expensive for me to go and
19 find it and delete it, sit down at the disk drive, now
20 I'm a collector.

21 MR. SCHUTZER: Then I say you're not really a
22 collector.

23 MR. MEDINE: I guess stepping back to sort of
24 the break down that the group proposed, are people, now
25 having gone through a discussion, fairly comfortable

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1 with at least the categories on the table? Are there
2 either different categories or different organizations
3 that people would suggest to the categories just for the
4 group as it goes back to the table to edit a section?

5 MR. DAVID HOFFMAN: One thing I did hear in this
6 conversation, this is David Hoffman from Intel, is we
7 probably need to make a mention in a discussion of the
8 second option what that notice means, and it may -- the
9 different kinds of notice there may split that into two
10 different categories.

11 One might be general notice, and the other might
12 be specific notice of the actual names of the third
13 parties.

14 MR. MEDINE: Rick?

15 MR. LANE: One question on entities, but it gets
16 back to what was just previously being discussed between
17 UPS and Fed Ex. I had my own small business, and I used
18 both Fed Ex, UPS and others, Airborne, and if I had a
19 privacy statement on my web site saying, I don't give to
20 third parties but in fact I ship my product out, and
21 that third party -- and that entity has that
22 information, I don't know how Fed Ex uses that
23 information.

24 To this day I don't know how Fed Ex uses that
25 information, so is it my responsibility to go and try to

1 figure out all the different distribution methods that I
2 use to figure out if that third-party information is
3 being used inappropriately considering what my privacy
4 statement says as a small business?

5 MR. SCHUTZER: That's a good question. I don't
6 know.

7 MR. MILLER: Good question.

8 MR. SCHUTZER: I would think it was Fed Ex's
9 responsibility if they're maintaining this is as a data
10 collector.

11 MR. LANE: How is my customer -- I guess if they
12 get Fed Ex packages they can go to Fed Ex. I don't
13 know.

14 MR. DAVID HOFFMAN: I would disagree with Dan.
15 I think it's your obligation to your customers to
16 protect their data, and so when you're signing up
17 shipping companies to actually be able to deliver that
18 product, you need to make sure that they are going to
19 protect that data as you have disclosed in your privacy
20 statement to the consumer.

21 MR. LANE: I mean, we signed up --

22 MR. WHAM: This is such a -- this is almost an
23 impossible standard of behavior to be hitting. What
24 you're saying is if a customer -- think about all the
25 ways the data comes through, right?

1 So you've got the customer who's originally
2 doing it. The data passes through their ISP so the ISP
3 has that information, and it passes over a public
4 network, and it goes through several different Sprint's
5 backbone and somebody else's backbone, and then it comes
6 through your the ISP or the site that's hooked into the
7 Internet that then hooks into your hosting system.

8 Then it gets to you and it gets printed out on a
9 piece of paper for the shipping clerk, and that gets
10 thrown into the garbage can. Do I have to indicate that
11 your information may have been disclosed to the
12 everyone.

13 I think there is a standard -- I would like to
14 return to my colleague who is doodling to my right here
15 from Consumers Union who put it very well. He said
16 there is a level of gradation and of reasonableness
17 where if I've got the fact that I shipped something to
18 your address, I hate to break it to anybody, but your
19 address probably isn't the most sensitive bit of
20 information about you in the entire world.

21 MR. TORRES: I wasn't doodling. I was doing a
22 graphic. I have a little person, a business, a shipper
23 back to the consumer, so I'm trying to --

24 MR. MEDINE: Do you want to talk about it for
25 the record?

1 MR. WHAM: So is Rick Lane is up for an FTC
2 enforcement action because he didn't disclose the -- he
3 used Federal Express and that --

4 MR. LANE: Am I, David?

5 MR. MEDINE: You could be.

6 MS. SWIFT: This is Jane Swift, and I think this
7 is why we get to a reasonableness and an ordinary course
8 of doing business, and some of these things about
9 whether or not you have to give access to the
10 information even if you're a qualified entity starts to
11 get weaned down.

12 However I do want to make one point. If you are
13 someone that's being stalked or you're a victim of
14 domestic violence, there are a lot of people for whom
15 their address is a secured piece of information which is
16 why we get into all these issues because not everybody
17 can guess what is a sensitive piece of information for
18 everybody else.

19 And that's why control and notice and access and
20 all these things are so important because for you, you
21 might not care. Everybody in the world knows where you
22 live but if you have somebody who's going to shoot you
23 if they find out where you live, then it becomes a
24 different calculation.

25 MR. MEDINE: I'm going to use the control,

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1 opportunities to shift the discussion to security just
2 because again the clock is ticking away, and we're not
3 going to have time, so I think we've got the basics of
4 entities on the table. Obviously there's a lot of fine
5 tuning that could be done, and we're still staying at 30
6 to 50,000 feet, but unless people have strong
7 objections, I would like to move on just to preserve the
8 time at the end.

9 Do you wish to proceed?

10 MR. BAKER: I will. The security group got
11 along remarkably well. The security group report that
12 you've got here has sort of four or five sections to do
13 our stretching exercises, and then we lay out -- we're
14 talking about page 20 through approximately 28. You'll
15 see in here four sections of kind of clearing the ground
16 and then a set of options that begin on page like 23,
17 but in fact we at least came up with an option, kind of
18 combination of options that we are recommending that
19 deserve some discussion here because we can't recommend
20 it without the entire group agreeing to it.

21 And that is to be found on page 28 and 29. We
22 make the recommendation that an appropriate security
23 program has three elements. There's a typo in here that
24 disguises that. First, that every web site ought to
25 maintain a security program, and that the elements --

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1 second that the elements of that security program ought
2 to be specified, and we give the examples of risk
3 assessment, planning and implementation, internal
4 review, training and then reassessment, a whole life
5 cycle.

6 And then the typo is in the next paragraph, our
7 third point should be C, an indented, that the security
8 program ought to meet an objective standard that it be
9 appropriate for the circumstances which obviously is
10 case by case and takes account of the fact that security
11 needs vary over time and there are particular
12 circumstances that might require more security or less
13 for particular data, and that cost is a consideration,
14 but essentially there is a requirement that you go
15 beyond just writing down any old thing as your plan,
16 that you actually meet a standard that could be defined
17 case by case to say, Is this an appropriate security
18 that you have -- program that you've written down.

19 The last thing that we cover is a set of
20 enforcement options, which we didn't provide pros and
21 cons on, that is a way of approaching the question of
22 enforcement, I think the focus on, Do we agree with
23 the security recommendations that came out of the group,
24 and everything else would probably be the best way to
25 handle this.

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1 MR. MEDINE: Anyone on the group want to
2 comment? Mary?

3 MS. CULNAN: Just add one quick point, that we
4 also argued that while notice is not enough, that the
5 appropriate program should also be accompanied by some
6 form of disclosure, and that we also call for consumer
7 education since consumers are often their own worst
8 enemies when it comes to security.

9 MR. MEDINE: Comments on the security? Rick?

10 MR. LANE: Just a couple things. First of all, I
11 notice that you have antitrust issues in here for
12 security, and so businesses can communicate to one
13 another, and it's obviously something we strongly
14 support, and there is legislation, legislation moving
15 forward just on that point.

16 It's not only antitrust issues, there are a
17 couple other issues that need to be attached to that
18 which include liability issues, so if information is
19 shared, that one business can't sue another business
20 similar to the Y2K liability, the first piece of
21 liability, not the second piece of the liability, and
22 also issues of sharing information, if you're sharing
23 information for security purposes with the federal
24 government, there's a strong concern from the business
25 community on FOIA requests.

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1 And I would like to have that incorporated as
2 well, that if you share information, and I know there is
3 some proprietary protections within FOIA, but again
4 looking at the Davis Moran legislation, if we clarify a
5 little bit because businesses were still somewhat
6 concerned about that.

7 And then going to consumer education, that's
8 excellent. I think the more we can do that the better.
9 The one that gives me most concern, and we can maybe
10 talk about it a little bit later, are the whole sides
11 of -- the enforcement options and remedies.

12 It makes me a little concerned. It looks like
13 we're now having -- I know they are options but having
14 recommendations sound too much like legislative
15 recommendations and, I don't know if we can drop that
16 part out, but I throw that out for discussion.

17 MR. MEDINE: Deirdre?

18 MS. MULLIGAN: I strongly object to including
19 reference to the Davis Moran and to creating new --

20 MR. LANE: Not to the Davis Moran bill but to
21 the concepts.

22 MS. MULLIGAN: -- to creating new exceptions to
23 FOIA. It's a whole huge discussion that has not
24 happened at this table, and I really would be
25 uncomfortable suggesting that in here.

1 MR. LANE: Can we list it as one of the
2 options?

3 MS. MULLIGAN: Personally I will very strongly
4 object to doing that. I'm just putting that on the
5 table. I don't know if the people around this table
6 are familiar enough with the FOIA issue to weigh in on
7 it, and if they're not, then I don't necessarily know
8 that we have the expertise here to -- I'm happy to brief
9 people and bring in papers if that's useful.

10 MR. LANE: As are we.

11 MS. MULLIGAN: As I'm sure other people are.

12 MR. MEDINE: I don't know if this will help, but
13 in what context in the self-regulatory environment would
14 this issue arise where the government was reviewing
15 security?

16 MR. LANE: Sure. There are I-SACs out there,
17 which are sector by sector entities that are
18 being created. There's a very good one in
19 telecommunications. Financial Services has an I-SAC,
20 and what the goal and what we've been working on for the
21 Partnership for Critical Infrastructure Protection which
22 is a Department of Commerce private public partnership
23 that we're working on is that there's several ways of
24 sharing information from business to business, but also
25 sharing information to the government so that they can

1 provide -- if I'm being hacked in financial services, it
2 may be a similar attack that's happening over in the
3 electric side or the energy side, and that the
4 government's able to find out where those common things
5 are and provide that information.

6 The concern is that under certain FOIA, that
7 proprietary information and what's going on could be
8 given either to competitors and/or other entities, and
9 there's concern among the business community that
10 they're not willing to share a lot of information
11 because of the FOIA aspects of it.

12 MS. MULLIGAN: And what I'm trying to say is
13 that that deals with sharing information with the
14 government, and there's actually absolutely no
15 discussion in here about businesses sharing information
16 with the government. There's discussion about
17 businesses working together to develop standards, and
18 there are some liability, there are some antitrust
19 concerns. There are no FOIA concerns.

20 And I don't want to throw something in here that
21 someone may pick up on the hill and use as an
22 endorsement as a piece of legislation or the notion that
23 there's a wide agreement that new exceptions to FOIA are
24 needed in this area.

25 I mean, I think you and I could have a

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1 conversation about that, but I don't want the report
2 used for that purpose.

3 MR. PLESSER: Then you're supporting the
4 preface?

5 MS. MULLIGAN: I'm supporting not having
6 discussion of FOIA in this document.

7 MR. WHAM: But did you want to support the
8 preface?

9 MR. MILLER: Different subject.

10 MS. MULLIGAN: When there is a preface that
11 is -- I certainly believe we need a preface.

12 I just want to commend Stewart because I think
13 it was not an easy thing, and this is the one subgroup
14 that actually has a recommendation, and I think the
15 subgroup is very comfortable with it, and I'm hoping
16 that we can get a sense around the room if there is
17 comfort with that recommendation because I think we can
18 give ourselves a big pat on the back if we even had just
19 one recommendation, and this one seems to be shining out
20 there.

21 And on the enforcement options I would like to
22 differ with Rick a little. I actually think the
23 enforcement issues go in part to some of the issues that
24 people were trying to address in the summary in saying
25 that there are a range of enforcement options here.

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1 And in fact the committee does not agree on how
2 enforcement should take place, but, however, here are
3 the kinds of things that we think can happen, and it
4 could be -- we can put in some different things here,
5 but the notion that there's a range of enforcement
6 options and therefore it's very clear that we're not
7 endorsing any specific thing --

8 MR. SCHUTZER: Right, I think that was the
9 spirit.

10 MS. MULLIGAN: -- would be very useful, and I
11 think it should not be part of the security discussion
12 but actually should be a broader part of the discussion.

13 MR. MEDINE: Greg and Steve.

14 MR. MILLER: In the interest of time I'll
15 withdraw.

16 MR. COLE: Like the other commenters I found
17 this an extremely useful and helpful section and I think
18 it illuminated the issues very clearly, but -- there's
19 always a but, I came away with a misgiving about it, and
20 someone alluded to it a little earlier. There seems to
21 be a government emphasis here or a requirement emphasis
22 here.

23 It's not only that the word required is used in
24 every section, but the sliding scale standard is
25 characterized as a government established sliding scale

1 to be contrasted with industry created standards, and
2 sliding scales can be created in any number of ways, not
3 necessarily by the government, and this would stand out
4 very differently than the other sections of the report.

5 And I don't know -- and the answer to that may
6 be, well, it's intentional, it's security, you really
7 need a different level of government involvement. If
8 that's the answer, I would be comfortable with it if we
9 said it specifically and explained why, but if it's not
10 the intent, I think that maybe would be helpful to
11 clarify.

12 MR. MEDINE: Dan and then Dan.

13 MR. JAYE: Thank you. I just want to agree
14 partially with Rick Lane about the fact that -- and I
15 think as well Deirdre here, if we're going to have
16 enforcement options listed in the document I think it's
17 inconsistent to have it in only one section, but I think
18 there's a broader question about whether or not there
19 should be -- how much we want to talk about enforcement
20 options in the discussion.

21 To the extent we talk about enforcement options
22 in the document, I just want to point out on the create
23 express private action option, it talks about Congress.
24 It implies that Congress would be necessary to do that,
25 and I believe that there's a potential for industry

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1 groups to contractually create private rights of
2 action. It's kind of a different concept, but I think
3 that it's a solution that we should and is certainly
4 worth some discussion.

5 MR. MEDINE: Dan?

6 MR. GEER: Dan Geer. Two things that I guess
7 are important to me: First, that the question of
8 sharing what it is you have learned from bad experience
9 is at the present time, regardless of whether it is FOIA
10 or inertia or I don't care what, is substantial.

11 Being in a position to see this, the same thing
12 happens over and over again in a lot of places, and the
13 ability to share that is widely understood to be
14 dangerous; hence, it doesn't happen. Whether you want
15 to call it dangerous because you can't share it with the
16 NIPC and because that will then be FOIA'd, whether you
17 consider it dangerous because if it gets to the press
18 the markets will punish you, whatever it is.

19 The inability to share information about bad
20 events is substantial, and I do not believe this
21 committee nor anybody has a handle on how to deal with
22 that. It is really hard.

23 Nevertheless, if there is any kind of white flag
24 that we could recommend creating where that kind of
25 stuff could take place, I assure you it would be used,

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1 and it would be valuable, and it would be a
2 contribution, and frankly it would be real nice if it
3 didn't stop at the edge of the U.S. territorial waters
4 because this kind of stuff, it has nothing to do with
5 territorial boundaries whatsoever, end of story.

6 The second thing in the question of who should
7 enforce and so forth, I'm uncomfortable with enforcement
8 stuff at this stage because I don't think we know what
9 the problem is well enough despite all this work to know
10 what all the solution is despite all this work.

11 Nevertheless, the insurance industry is coming
12 in this space, and they're coming hard and they're
13 coming fast and they're looking to do something that as
14 the electronic portion of our economic life grows, the
15 necessity of the insurance idea grows. I assure you
16 underwriting standards are going to cause things to
17 happen that frankly I don't think this organization,
18 this building could cause to happen.

19 They'll come from economic reasons, and they'll
20 be strong, and that is just around the horizon. I can't
21 go much further than that, but it really is just around
22 the horizon. What a reasonable underwriting standard is
23 for people that handle lots of other people's data is a
24 hot topic in the biggest insurance firms right now, and
25 I guarantee that this will have some impact and quite

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1 frankly really soon.

2 If there's anyway we can encourage saying
3 economic results to lead us in the direction we want to
4 go, I'm just telling you that the horsepower is out
5 there, and it's only a question of whose hand is on the
6 steering wheel, but the horsepower is there.

7 And I'll shut up. I think I've beat that in the
8 ground. I hope you get the idea. There's an awful lot
9 of demand for solutions to security, way beyond the
10 question of handling private data. There's an awful lot
11 of demand for this, and if there's a way in which we can
12 help with this, I think the answer would be how to
13 determine recourse in the event of bad things is the
14 primary way that you would be able to steer where this
15 goes.

16 Something bad happened. Therefore in the
17 American society it must be somebody's fault. Nothing
18 ever happens by accident. Therefore, how are you going
19 to allocate recourse? That's the only steering wheel I
20 submit that you have.

21 MR. MEDINE: James?

22 MR. ALLEN: I would like to compliment the group
23 with coming up on a set of recommendations. I
24 think they're a very good set of recommendations that I
25 can support with one minor change. The point A says

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1 that there should be a security program that applies to
2 personal data that the entity has collected, and while
3 our charter may be to deal with information that's
4 collected online, I would certainly hope that we would
5 want a security program implemented that applied to all
6 personal data that the entity had in its possession and
7 control, not just data it had personally collected.

8 MS. MULLIGAN: I think we could probably agree
9 to that. Stewart, can we agree to that? I think that
10 was the intent.

11 MR. MEDINE: Good.

12 MR. ALLEN: It's just the previous discussion was
13 very specific about the use of the word collector.

14 MS. MULLIGAN: It was, you're right. We will
15 change it to hold or something.

16 MR. BAKER: Yes.

17 MR. MEDINE: Other comments on the security
18 section?

19 MR. WHAM: I have one comment. Given that in
20 all four of our sessions it seems like we have these
21 really, really difficult chart things on access in the
22 morning and then we reserve time on security and just
23 blow right through it, I wish I was the security expert
24 and being on that side of the fence.

25 MR. MEDINE: In your next life.

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1 MS. MULLIGAN: We've had four hour phone
2 conversations six times a week.

3 MR. TORRES: Then since we have time, I'll add
4 my two cents. Job well done on this section. It looks
5 really good, and I think it might serve as a template for
6 the rest of us on the other sections as to how to format
7 it. Thank you, for spending four hours on the conversation.

8 MR. MEDINE: Thanks. Dan?

9 MR. SCHUTZER: I would like to move it to the
10 process discussion that we had because it seems to me --
11 .

12 MR. MEDINE: At that point, let me just make a
13 suggestion of schedule, and people can come back to me,
14 but we did reserve time for public comment. I thought
15 once we finished the security, we can take up public
16 comment, take a break and come back and wrestle with the
17 process until we're tired of wrestling with the process
18 and then we call it a day, but if you want to do it in a
19 different order, it's your committee, you can decide.

20 MR. PLESSER: We said we would come back to the
21 issue of preface as well.

22 MR. MEDINE: That's part of the process.

23 MR. CERASALE: One question. I agree with that
24 but one question back on security. The way we have
25 liabilities set up in here I think we discussed it but I

1 just want to reiterate we're going to try to get the
2 liability over towards that, also to the providing
3 access area.

4 MS. MULLIGAN: Yeah, I think there's a question
5 which hopefully I think the mandate is clear, that the
6 liability piece has to be prominently worked into both
7 the access considerations and security considerations,
8 and it's a question of how to do it.

9 MR. CERASALE: That's fine. I just wanted to
10 reiterate.

11 MR. MEDINE: Are people amenable to proceeding
12 to public comment, break and then process issues?
13 Okay.

14 Is there anyone in the public who would like to
15 make a comment? I see a couple back there. If you
16 could please identify yourself once you get the
17 microphone.

18 (Discussion off the record.)

19 MS. MARTIN: Thank you. I am Dianne Martin, the
20 chief policy officer for GeoTrust, which is an Internet
21 start-up company based in Portland, Oregon. GeoTrust is
22 developing a suite of Internet based products and
23 services designed to reduce risk in the online business
24 to business transactions by creating a technology based
25 trust infrastructure that will increase confidence in

1 e-commerce by enabling companies to evaluate the
2 authenticity of the identify, reputation and performance
3 capabilities of other companies.

4 I've heard some allusion to this issue already
5 in this committee. My comment centers around the
6 similarity between the privacy and security concerns
7 related to protecting the personally identifiable
8 information of individuals and the confidentiality and
9 security concerns related to protecting critical data
10 for commercial entities, data such as transaction data,
11 digital signatures, trade secrets.

12 Now, we recognize that this committee is
13 chartered and operating nominally under the Bureau of
14 Consumer Protection and is focused primarily on
15 consumers, but we're very concerned that focus be given
16 to the rapidly expanding value of business to business
17 transactions online.

18 So when you make your recommendations to the
19 Commissioners, we therefore would request that the
20 committee consider including comments on broadening the
21 definition and principles for protective data to include
22 legal entities such as companies along with the concerns
23 already stated for individuals.

24 Thank you.

25 MR. MEDINE: Thank you. Identify yourself, please.

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1 MR. CATLETT: Jason Catlett from Junkbusters.
2 Two comments, one responds to Jerry Cerasale's solution
3 that there are costs associated with access, and they
4 should be noted. Certainly there are costs, and I think
5 it would be good to have, to the extent that you can
6 document this, those costs both in terms of the capital
7 costs of providing the infrastructure for that plus the
8 variable cost of doing that over and over again so it
9 would be good to document that.

10 I think it's possible that the net result of
11 providing access may be to lower costs to both
12 businesses and consumers. For example in the Fair
13 Credit Reporting context, we've seen the quality of data
14 has risen since the access requirement was mandated, and
15 we may see that similar sort of effect. We may not. So
16 I would like to see that documented.

17 Secondly, just an observation, this is the first
18 of these sessions that I've been to. I know I've been
19 generally impressed with the discussion this morning and
20 how well informed and diligently people are working, and
21 I would like to say thank you all for giving your time
22 to this common cause.

23 MR. MEDINE: Other members of the public?

24 MR. LEE: Hi there. I would like to say thank
25 you for the opportunity to allow the public to speak.

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1 Once again my name is Dennis Lee. I'm from a company
2 called IFSec, and we're an information security firm
3 based in New York. Actually I would move to nominate
4 all of you for the next Emmy award for providing the
5 public with such wonderful drama and conflict.

6 But in any case, I have a very short but
7 important suggestion, and that is as you are putting
8 together your recommendations, if you can please
9 consider making your recommendations timeless or at
10 least stand the test of time.

11 The reason why I say this is we are -- our firm
12 is getting a whole new class of clients these days in
13 the world of web development, and lo and behold, folks,
14 if you haven't seen this already, this is what the new
15 web browser looks like. It's on a much smaller
16 platform, and there other issues concerned with this,
17 and that is these devices, there are many similarities
18 with this type of wireless technology that you guys are
19 talking about that can apply here with the wireless
20 world as well.

21 For example, these devices have authentication
22 quite often built in, and there's also strong encryption
23 applied as well, but there are also differences and that
24 is, for example, of all the web sites that -- the
25 wireless web sites that we've been looking at, very few

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1 if any have privacy policies on them.

2 So, in other words, if I use this little device
3 to browse a wireless web site, you won't find that many
4 web sites that have privacy policies for example. Yet
5 the rules still apply. That's number 1.

6 Number 2, we've also been finding out that a
7 unique identifier, we've been talking about unique
8 identifier, doesn't necessarily link to an individual.
9 However, in this case it may be linked to an individual,
10 to a phone number receptor, so there may be perhaps new
11 issues we may need to contend with.

12 It's probably too late perhaps for you guys to
13 throw in sort of the wireless perspective to all of
14 this, and it may mean in the future the FTC may need to
15 revisit this issue, but my recommendation again is
16 please keep us in mind. Think of the future and make
17 sure your recommendations are as timeless as possible.

18 Thank you very much.

19 MS. GAU: I would like to comment.

20 MR. MEDINE: Thanks for your comments.

21 Tatiana?

22 MS. GAU: With respect to the second point you
23 made as to some unique identification methods that are
24 being used in the wireless space, in particular the cell
25 phone numbers, as most of us here probably know last

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1 month Sprint PCS got taken to the table on that issue,
2 and they have backed off of that practice, and I want to
3 emphasize that as one illustration of how the market
4 forces do come in to play and push companies in certain
5 directions, particularly when the public cries out and
6 condemns certain practices by a company.

7 But I would also like to commend you for
8 bringing this issue to the table because indeed this is
9 happening very fast with TV, all kinds of devices and as
10 some of you may know, AOL is very much active in that
11 space where the rules are completely changing.

12 MR. MEDINE: Are there other public comment?

13 MR. MILLER: David, response to the commenters?
14 I would like to hear from the gentlemen given what
15 you're talking about -- Greg Miller, MedicaLogic. We
16 actually have a lot to do in the wireless space within
17 health care because of electronic medical record
18 devices, wireless devices. Given what you're talking
19 about really goes to what I'll call the transport layer,
20 do you have some things that you think the committee
21 should look at specifically that you think are unique or
22 different in the wireless space given it's wireless
23 access protocol, et cetera, et cetera, that wouldn't
24 already be covered by this?

25 MR. LEE: Yes, but I would think to be fair it

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1 does come rather late to be introducing all of this at
2 this late date. That's why I said at the end it may
3 mean that the FTC may need to revisit this issue in the
4 future, but probably in the very near future as well
5 though.

6 MR. MILLER: That's what I'm trying to draw
7 out.

8 MR. MEDINE: Deirdre.

9 MS. MULLIGAN: One thing that actually the P3P
10 working group has dealt with recently, and I actually
11 would make a move or motion to actually perhaps add
12 something to the definition that at least gets to a part
13 of this, is there is one significant information
14 explicit, I think it would be useful for us to reflect
15 that other category of information within our
16 definitions.

17 I think most of the other discussion is still
18 very general, and so I'm not sure if -- I too have some
19 concerns about whether or not we're going to be outdated
20 in a week, but I think at least by doing something that
21 takes our hat off and says, Yes, we recognize there's
22 different kinds of data created by these kinds of
23 devices I think would be a nod in that direction, so I
24 don't know if people would be opposed to that or Lorrie
25 or myself I think can float the language.

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1 MR. MEDINE: Lance?

2 MR. LANCE HOFFMAN: I want to follow up
3 Tatiana's point because if we're doing this for record
4 which we may use to produce the report on, I read and I
5 assume it can be confirmed by the gentleman to my right,
6 that Intel in its latest version of the next chip has
7 gone and again backtracked from the identification
8 information it had in the previous Pentium model.

9 MS. MULLIGAN: We want to applaud that.

10 MR. DAVID HOFFMAN: Yeah, I can confirm that.

11 MR. MEDINE: I think we have another member of
12 the public who would like to comment. Identify
13 yourself, please.

14 MR. SMITH: Christopher Smith. I'm from a
15 company called EIdentification in Massachusetts. I
16 would like to thank the FTC for putting this on and
17 opening it up for the public. This was very good for
18 small start-ups like myself.

19 We are about identifying and authenticating
20 individuals online, and there are certain industries out
21 there where personal information is necessary in order
22 to conduct business such as the online alcohol market.
23 There's also car rentals and such areas as online
24 pharmacies where age is significant, and any privacy
25 issues by identifying these sorts of organizations and

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1 protecting the information I think would be critical
2 because they need the personal information.

3 MR. MEDINE: Thank you very much. Other
4 comments? Thanks for all the members of the public who
5 commented.

6 MS. MULLIGAN: I wanted to respond. It's that
7 age and identification don't necessarily have to be
8 coupled. And I think it's a challenge for -- if you
9 think about it, I wave my driver's license around and
10 people look at it and they determine my age. They
11 actually don't -- 7-Eleven doesn't keep a record of my
12 identity, and there's a challenge in the online
13 environment to figure out techniques that allow me to
14 reveal my age and to verify my age in some way but not
15 to leave the same kind of detailed identification trail
16 behind.

17 MR. SCHUTZER: There are some business models
18 based on that premise already.

19 MR. LANE: I just wanted to comment about the
20 wireless because I noticed, as I look around the table,
21 I am not the only one that's using my cell phone to
22 access the Internet right now, not that we were doing
23 other things while we were here.

24 MR. MILLER: I'm picking up a lot of data here.

25 MR. LANE: One of the concerns about a lot of

1 recommendations even if we took them all at face value
2 is when -- if there is a movement towards regulation in
3 this area. The cell phone and the wireless
4 communication is a huge issue just because -- exactly
5 what am I going to be able to read on my little screen
6 and what does that mean, and do you just not -- are you
7 not able to access web sites because it's just
8 physically impossible to have all these different
9 requirements from security and so on and so forth that
10 are mandated on companies where in fact in the wireless
11 market, which is the fastest growing area, new
12 technologies are being developed all the time that allow
13 -- and there's a concern that specific recommendations
14 on here is security, here is all these different things
15 that are going through and in some folks mind could
16 really deter development of this new wireless market.

17 So I think it's an interesting idea to have
18 another committee reflect it in what we're talking about
19 today to keep it timely.

20 MR. MEDINE: Great. Let me, unless people want
21 to barrel through, suggest just a short break and
22 perhaps during the break you might have a chance to chat
23 with some of your subcommittee members who you might
24 want, one or two people to serve on a drafting
25 committee. Maximum 15 minute break.

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1 (A brief recess was taken.)

2 MR. MEDINE: Before we get into the nitty-gritty
3 of report preparation, I would like to introduce to the
4 group the director of the Bureau of Consumer Protection
5 Jodie Bernstein.

6 MS. BERNSTEIN: Thank you, David. It's
7 wonderful to see you all again. I know you've all had a
8 marvelous time, and I know you're going to miss coming
9 in here like once a month, so I'm going to propose we
10 have another advisory committee. No, no.

11 MS. MULLIGAN: Just another meeting.

12 MS. BERNSTEIN: Just another meeting. Just
13 another meeting, and I really just wanted to convey to
14 you the thanks and the gratitude of the Commission as a
15 whole. Each Commissioner has mentioned how useful this
16 group has proven already and how much we all appreciate
17 the length of time, the amount of work you all have
18 done. It's just been extraordinary, so that really is
19 my role.

20 I had looked to see what are the benefits of
21 this group so far because of course everything has to be
22 cost benefit these days, so one of the costs was David
23 and I gave the shirts. That's also a benefit.

24 The other one that I particularly wanted to
25 convey is I think you all know that our person upstairs

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1 at The Top of the Trade, who is not a federal employee
2 but rather a contractor, somehow I've developed some
3 kind of an obligation to him that I have to produce a
4 certain amount of business. Otherwise he won't make his
5 numbers, you know, at the end of the quarter, so today
6 he said, You've been doing good, you've been doing good,
7 now are you going to have another one of these things,
8 so any of you would like to come back for lunch
9 regularly, it would be a great benefit to me as I do my
10 cost benefit analysis for running the bureau.

11 In all seriousness, we really feel very grateful
12 and really do thank you for all of it. I want you all
13 to wear your T-shirts from now on so that you will
14 remember us, not forget us, and we are looking forward
15 to your report. So is the Commission.

16 We've briefed all of them regularly, those who
17 haven't been able to be here, and again my thanks,
18 David's thanks. Our staff has been working with you and
19 very much appreciate the whole effort.

20 I don't know how soon again we will ever have an
21 advisory committee unless it's all of you. Do you have
22 any questions that you would like to ask me while I'm
23 here for my brief interlude? This is one of my Loretta
24 Young appearances where I sweep in and out. Remember
25 those?

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1 MR. TORRES: Frank Torres, Consumers Union. I
2 just want to commend you and your staff and certainly
3 David and everyone else involved in this process.
4 They've been very diligent in keeping us in mind and
5 providing a free flow of information as we've gone about
6 our deliberations and they're to be commended, not just
7 -- a lot of us deal with your staff on a lot of issues,
8 and it's always been very professional and very
9 knowledgeable and the access has been there, no pun
10 intended, and we appreciate that very much.

11 MS. BERNSTEIN: Thank you, Frank. We have made
12 every effort to have all of our processes be as open as
13 we think government should be to everyone, and I think
14 this was illustrative of how much value there is in an
15 open process, so we'll continue to do that and look
16 forward to David finishing up here the nuts and bolts,
17 and I won't keep you here any longer because I know
18 you've been here all day.

19 So thank you very much again, and we'll see you
20 soon.

21 MR. MEDINE: Thanks, Jodie. And also while
22 we're giving out thanks, I wanted to thank the people who
23 are behind the advisorycommittee@ftc.gov, Allison
24 Brown and Ellen Finn who have really made all of your
25 meetings proceed as smoothly as they have.

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1 (Applause.)

2 MS. BERNSTEIN: Nobody in this room is to try
3 to hire them. You'll get kicked off the committee.

4 MR. MEDINE: Okay. Now that the fun stuff is
5 over, let's get to work, and --

6 MR. COLE: Jodie's last comment was you were
7 going to finish up.

8 MR. MEDINE: I'll adjourn the meeting, and we'll
9 call it that.

10 There are a number of things we need to think
11 about. Maybe one thing that will be helpful up front is
12 to look at the calendar because that ultimately both
13 because of the charter and because of the Commission's
14 specific needs for the report I think will drive the
15 agenda, and that is we do need again to deliver a report
16 to the Commission on May 15.

17 MR. WHAM: I would like to challenge that
18 assumption right now. What we're trying to do is we're
19 trying to jam 20 pounds of potatoes into a 10 pound
20 sack. I can state as someone who came out from the West
21 Coast, my mailbox on this topic was empty when I left
22 at 6:30 in the morning on Thursday.

23 There were 27 messages in my box when I arrived
24 in Washington, D.C. at four o'clock in the afternoon,
25 just a sign of how we are always putting stuff through.

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1 We have a lot of drafts we need to comb through. We've got
2 some drafts that need to go back for all the people that
3 participate and so forth.

4 I think May 15 is nice, but is not a drop dead
5 must have, and the Committee's authority runs through
6 the end of the month, and if we have that extra time,
7 you would end up with a better product.

8 MR. MEDINE: I refer you to the second page of
9 the charter, quote the duty section which states that
10 the advisory committee will provide advice and
11 recommendations in the form of a written report to the
12 Commission describing options for implementing
13 reasonable access to, and adequate security for,
14 personal information collected online and the costs and
15 benefits of each option by May 15, 2000.

16 MR. WHAM: With all due respect I believe the
17 FTC has the power to change that charter if they are so
18 inclined.

19 MR. MEDINE: I don't believe so. The charter
20 was approved by the General Services Administration, and
21 that is the charter we've been operating under, and I
22 don't believe it can be. Also just --

23 MR. COLE: Just for argument's sake, what would
24 happen if the committee didn't submit the report by May
25 15?

1 MR. MEDINE: The committee would not have a
2 report. Alex.

3 MR. GAVIS: Could you submit the executive
4 summary and then the report to follow?

5 MR. WHAM: We'll never get take the executive
6 summary done so that doesn't matter.

7 MR. GAVIS: I withdraw the question.

8 MR. MEDINE: The report also obviously will be
9 very timely in the Commission's consideration of the
10 results of our survey of web sites, so I think it's in
11 everyone's interest to get the report in on time, so it
12 could be part of the Commission's consideration of the
13 2000 online survey.

14 But again besides that, I think the charter does
15 bind the committee to produce whatever it's going to
16 produce by May 15.

17 MS. GAU: David, I just want to refer back to
18 the fact that at some point we're all going to have to
19 vote on the report, and if there are a certain number of
20 us that think that the report is still not fine tuned
21 enough and hasn't -- does not reflect all the views and
22 all the issues that we have discussed, there are going
23 to be nos that are going to come through there, which
24 are going to make it such that no report is submitted if
25 the process goes as I understand it.

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1 MR. MEDINE: Well, again remember there is an
2 option that every committee member has to submit a
3 separate statement of their views, so you can
4 procedurally as is sometimes done, vote to say that --
5 I guess as committees and Congress do vote the Senate
6 nomination to the floor, not because they support the
7 nominee but they think the floor ought to -- the full
8 Senate for instance ought to consider the nominee even
9 though they personally may not be thrilled with them.

10 So you have an option to procedurally submit the
11 report to the Commission with your views as to the
12 weight to be given to the report or any particular set
13 of recommendations. Again that's the committee's
14 option, and the committee -- obviously the committee has
15 to proceed by a majority vote in terms of whether it
16 submits a report and on what date and in what fashion.

17 MS. MULLIGAN: Majority, not unanimity.

18 MR. MEDINE: That's absolutely correct.

19 MR. PLESSER: Is there an opportunity perhaps
20 for a short meeting or another meeting because I think
21 part of the problem is really to have some of this, if
22 we did go on to a drafting committee if it's -- and I mean
23 I think that between the chamber, there are rooms that
24 we could do it in.

25 MR. WHAM: We would be happy to host it out in

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1 Redwood City for you.

2 MR. PLESSER: I mean, there may be -- I think
3 part of the problem is this is the last meeting where
4 the group as a whole can supervise it. Is there an
5 option at the Trade Commission or an option in a hotel
6 or can we have a meeting without you?

7 MR. MEDINE: No, you may not. No more than a
8 quorum of the committee can meet without it being a
9 committee meeting, and if a committee does meet, it has
10 to be in public session.

11 No, I believe -- I need to review this more
12 carefully I believe there is flexibility both in the
13 charter and the bylaws to have another meeting. While
14 we are bound by the charter to submit whatever you're
15 going to submit by the 15th, there is flexibility of the
16 additional meeting.

17 Now, whether the committee had so much fun you
18 want to do this again. Personally we would be happy to
19 host that meeting, absolutely.

20 MS. MULLIGAN: Could we do it on the 5th so we
21 could actually have an in person vote? I know that's
22 two weeks away.

23 MR. MEDINE: Can I consult?

24 MR. LANE: That's one week away.

25 MR. WHAM: Is it possible to amend the charter

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1 so we've got another week?

2 MS. MULLIGAN: It's not.

3 MR. MILLER: You can't amend the charter.

4 MR. WHAM: The GSA cannot?

5 MR. MEDINE: What is the question?

6 MR. COLE: It's impractical and they can't, but
7 to say --

8 MR. WHAM: I really feel like we're being boxed
9 into something which is going to put us in a really
10 substandard product where there's some really excellent
11 work just ticks me off. I can't believe that we
12 cannot -- does it -- are other people of agreement that
13 having to come up with a completed report by the 15th is
14 going to yield a substandard product versus another
15 week?

16 MR. MILLER: Greg Miller here. While we've been
17 talking, being in the web production for years I just
18 did a little napkin calculation here. Just for reality
19 check, based on the number of pages we have to date,
20 plus some assumptions about front matter and back matter
21 and production and everything and a committee to pull
22 that together, I really believe we're realistically
23 looking at 41.5 hours of production time, so start from
24 the 15th of May, back up 41 real hours.

25 MR. WHAM: Two days.

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1 MR. MILLER: You're volunteering?

2 MR. WHAM: You were saying it was Internet
3 based.

4 MR. MEDINE: I'm sorry. I'm advised by counsel
5 here that I think there may be a requirement under the
6 Federal Advisory Commission Act for public notice of
7 Commission -- notice 15 days in advance, so I don't see
8 how as a practical matter that can be accomplished.

9 The Federal Trade Commission as a body approves
10 federal register notices, so I don't know if we can
11 obtain a vote of the Federal Trade Commission today but
12 I think it would be required. I'm not even sure if we
13 publish it first, so I think there may be practical
14 impediments to having a meeting.

15 We're not opposed to it, and I don't think the
16 charter prohibits it, but I think we may be procedurally
17 unable to accomplish that. One second. Richard?

18 MR. PURCELL: Richard Purcell. It's crunch
19 time, and we've known this for four months now, and if
20 we are not prepared to produce a quality product on the
21 15th of May, then it's a shame we're not, not on anybody
22 else. This is a known deal.

23 Where I come from there's a saying when you are
24 faced with these kinds of deadlines which is what if you
25 don't eat and sleep, and that's pretty much how it

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1 goes.

2 So I come from an environment where you don't
3 eat and sleep right at the -- in the final hours, and
4 that's how you produce the product on time, but I think
5 it's absolutely --

6 MR. WHAM: Windows 95?

7 MR. TORRES: All you types on the West Coast.

8 MR. PURCELL: It's a critical element of the
9 credibility and integrity to produce a quality product
10 on time.

11 MS. MULLIGAN: This is why everyone should think
12 carefully if you're one of the two people that your
13 committee has selected because you may be on the don't
14 eat and sleep schedule.

15 MR. MEDINE: Let me suggest that while we don't
16 have much flexibility as perhaps we would like, we do
17 certainly have all possible flexibility up until the
18 15th, and if you submit something to the staff, we will
19 be responsible for copying it, duplicating it and so
20 forth. The question is so that you have basically until
21 the 14th to get something to us --

22 MS. SWIFT: Can I just say that just from having
23 done some of the subcommittee reports and being the
24 person in charge of producing them, that I think the
25 most useful expenditure of the next 25 minutes would be

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1 to figure out if it's going to take 41 and a half hours,
2 what are the deadlines that you expect everybody to
3 meet, firm deadlines in the next two weeks because the
4 truth is while there may have been 27 emails in the
5 last 12 hours, I would put forward from my experience,
6 and this isn't an indictment of anyone who's served on a
7 committee with me, that that was pretty standard
8 practice, that the first seven days we had things out
9 there.

10 And that's just how people function, and it's
11 not just in Microsoft. It's in government and
12 everywhere else. When there's a firm deadline, people
13 meet it, so I think usefully we should determine what
14 needs to be done between now and the 15th, how we're
15 going to achieve it and what the deadlines are, and
16 everyone can be clear, and if you decide not to
17 participate because you can't meet the deadline, then
18 you lose.

19 MR. MEDINE: Well, then I would turn it to you
20 and offer suggestions for deadlines in terms of what --
21 you guys are close to the work product and know what
22 needs to be done.

23 MR. LANCE HOFFMAN: Following up right before
24 lunch when I said my understanding is we have to do
25 this, this, this, this, this and I went through a little

1 chart I had drawn, and what I didn't say is I put dates
2 next to it so let me put this out as a straw person.

3 Today is April 28. I would propose that by
4 the -- that there be a subcommittee that meets, a
5 drafting committee, if you will, that produces what is
6 going to be a major effort, not much eating and sleeping
7 -- produces a draft by May 4.

8 MS. SWIFT: Is that a draft of the report or the
9 report what we're also calling a preface and/or executive
10 summary.

11 MR. LANCE HOFFMAN: Just to put something on the
12 table, that is a draft of the report with an executive
13 summary. I am silent on whether or not there is a
14 preface. Then that draft goes out by email to people,
15 and by April the 7th.

16 MS. GAU: May.

17 MR. LANCE HOFFMAN: I'm sorry, by May 7 comments
18 are received by everybody, comments are back in.

19 MR. SCHUTZER: Wait. The draft is done May 4.
20 Some of us won't even see it until the 5th.

21 MR. LANCE HOFFMAN: This is Internet time. You
22 can disagree with this, but I'm just putting it on the
23 table. I'm with Richard's school of thought on this.

24 MR. SCHUTZER: That means the draft is out and
25 distributed by the 4th.

1 MR. LANCE HOFFMAN: By 11:59 p.m. on May the 4th
2 the draft is distributed.

3 MR. MEDINE: Which time zone?

4 MR. LANCE HOFFMAN: Eastern Time. By May 7th,
5 11:59 p.m. Eastern Time, comments are in. Comments are
6 returned to the drafting committee. The drafting
7 committee takes these into consideration, makes
8 whatever changes it deems appropriate and produces those
9 by May 9 so by 11:59 p.m. on May 9, that is the -- now
10 you have the draft final report.

11 By May 12 persons or individuals who wish to
12 make comments, dissents, whatever they're called to go
13 in the entire package, I gather that's how this works,
14 produce those so that by midnight or 11:59 p.m. on May
15 12 those are done. They all go into the FTC so that
16 allows for some transmission difficulties and such, by
17 the beginning of business on May 13 the FTC has this
18 material.

19 MR. PLESSER: That's a Saturday.

20 MR. SCHUTZER: The only suggestion might be a
21 meeting on May 12.

22 MR. PLESSER: Given it's a weekend date.

23 MR. LANCE HOFFMAN: Make it May 15.

24 MR. SCHUTZER: So suggest a meeting like May 12
25 where we can all sit here.

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1 MR. LANCE HOFFMAN: Impossible because of the notice
2 constraint.

3 MR. MEDINE: We can't meet.

4 MR. JONATHAN SMITH: We can't meet.

5 MR. TORRES: Can we meet in separate groups?

6 MR. MEDINE: You can meet in groups that are
7 smaller than a quorum committee. Let me just add on to
8 that schedule. We need to build in a voting period of
9 time on the final report. Now, that may be from the 9th
10 to the 11th, that's fine. Whatever you want to decide
11 the schedule you impose on yourself, but we do need an
12 affirmative vote by the committee.

13 Let me just signal, I think we should take a
14 vote at the end of today that we are approving this
15 procedure and these deadlines and these voting
16 schedules, but we'll also need individual votes on the
17 final transmission of the report to the Commission.
18 Again it's not an endorsement of the report, just a
19 transmission of the report. Rick, then Deirdre.

20 MR. LANE: Rick Lane, U.S. Chamber. In terms of
21 the quorum and not being able to meet and some of those
22 technicalities.

23 MR. MEDINE: That's the law.

24 MR. LANE: I'm going to say this as a non
25 lawyer, but during the ecommerce Commission meeting,

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1 they had a similar problem where they were trying to
2 meet, and what they did is they sent actual Commission
3 members out of the room so there was never really the
4 quorum that met the criteria.

5 The chamber has the ability to break rooms down
6 into very small rooms, and if the groups were meeting
7 separately and not all together at the same time in
8 different drafting committees and they weren't meeting
9 -- I don't care if it's opened up to the public,
10 that's not a concern of mine, but if they are meeting in
11 separate meetings and not meeting all at once, is that
12 technically a violation of the quorum requirement?

13 MS. MULLIGAN: I would be uncomfortable with it
14 as a lawyer.

15 MR. LANE: My thing is the notice issue. I'm
16 just trying to offer a suggestion.

17 MR. JONATHAN SMITH: Is it realistic to think
18 that this group of 40 people could assemble a quorum in
19 the next couple weeks anyway? I'm sorry, but I'm not
20 going to be there. It's not going to happen. I can --
21 you can probably eliminate enough people just physically
22 from making a meeting.

23 MS. MULLIGAN: That in fact supports in the
24 suggestion that doing it my email would probably
25 better, allow more people.

1 MR. JONATHAN SMITH: I can't be there.

2 MR. COLE: I have another question. If this was
3 a board of directors, which it's not, under the
4 corporate laws of every state we wouldn't be able to
5 take a vote except at an in person meeting, this would
6 be a deliberative body.

7 If our charter and the GSA rules and all that
8 prohibit us from having a meeting, is it clear that
9 we're permitted to take a vote knowing that we may not
10 meet to discuss our vote? Something's wrong there.

11 MR. MEDINE: The charter does not specify the
12 mechanism by which the vote is taken, so we have been
13 operating under the assumption that the committee by a
14 vote in person could authorize an email vote.

15 MR. COLE: Why do we have these procedures at
16 meetings? It's because there's an interface between
17 public accountability, public observance and
18 participation and the roll of kind of a private group
19 advising the government, so we're talking about having a
20 vote that's as private as it gets.

21 MR. MEDINE: The vote will be on a public
22 document and the public --

23 MR. COLE: The result of the vote.

24 MR. MEDINE: The result will be recorded
25 publicly.

1 MR. GEER: Are all the emails to date public
2 record as well? Is that what you're getting at?

3 MR. MEDINE: I believe they are.

4 MS. MULLIGAN: They are FOIA --

5 MS. GAU: They are not. They are not.

6 MR. MEDINE: I don't believe they're exempt from
7 FOIA.

8 MS. MULLIGAN: If they went to the Advisory
9 Commission's mail box I think they're certainly subject
10 to FOIA.

11 MR. MEDINE: They're not on the web site, but I
12 don't think they would be exempt from FOIA.

13 MR. TIERNEY: I don't know how -- how are you
14 doing over there? Are you getting every word?

15 I'm very uncomfortable with any attempt to
16 circumvent not only the letter of the law but the spirit
17 of the law. It's not only wrong because it's against the
18 law. It also subjects this committee which is -- whose
19 work is going to be viewed in many forums, hopefully if
20 we've done our job to the kind of inappropriate
21 criticism that we don't need, so I feel really pretty
22 strongly about that being a law enforcement person.

23 I just wanted to respond, the second point is if
24 we have enough faith in our drafting committee of ten
25 and the right individuals, isn't it ten?

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1 MS. MULLIGAN: Eight I'm hoping.

2 MR. TIERNEY: Two for the preamble so I came up
3 with ten, if we have enough respect for those, and we
4 have the right people and we've chosen wisely, I think
5 this is not a major problem. I think all views would be
6 represented, and since this is a 100 percent email
7 literate organization, I think that we can use it
8 appropriately.

9 MR. LANE: David, if I can clarify. I wasn't
10 attempting to say anything. That's why I was asking as
11 a non lawyer, not a lawyer, the technical question if we
12 were trying to get together.

13 MR. TIERNEY: I think we all appreciate the
14 frustration.

15 MR. LANE: I didn't want to do anything that
16 would cause anyone to be uncomfortable.

17 MR. TIERNEY: I think we ought to get past
18 that. We know the time frames we have to work in.
19 We know the law we have, so we do the best we can with
20 what we've got.

21 MS. SWIFT: Can I just ask if we agree with the
22 time line that Lance gave?

23 MS. MULLIGAN: No, and that's what I'm trying to
24 get back to.

25 MR. MILLER: We're trying to get through this.

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1 MS. MULLIGAN: I as somebody who I think from my
2 group will be on the small committee, we actually didn't
3 talk about it completely, Rick and I talked about it. I
4 talked to Richard, Jerry, but I would much prefer that
5 we try for a preliminary draft, a second draft and a
6 final draft because I think that if there are only eight
7 people representing 40, I would much rather get it out
8 twice even if only half the people get comments back
9 than only get it out once because I would just feel much
10 more comfortable.

11 And so I would like to suggest that we actually
12 try to have a preliminary draft out on Wednesday the
13 3rd, try to have a second draft out either at the end of
14 the day on Friday the 5th or on the 8th, allow comments
15 back in, try to have another draft out by 7:00 p.m. on
16 the 10th or maybe 9:00 in the morning on the 11th and
17 have votes on the 12th.

18 And I know that that pushes the voting, but I
19 think it allows people to read and digest more and
20 comment, and because if we're talking about eight
21 people, I really want to make sure that those eight
22 people get what 40 people want.

23 MR. SCHUTZER: Some of us -- I would like to
24 see the extra draft, but some of us, we have fire walls
25 and things, we don't always get these drafts like in

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1 real time. Sometimes I'm getting it like a day late.

2 It might be impossible to vote if I get it late.

3 MR. TORRES: Maybe we should do it by fax.

4 MS. MULLIGAN: Just the principle of having more
5 than a preliminary draft and a final draft I would like
6 to have an intermediary.

7 MR. SCHUTZER: I agree with that, but give us at
8 least two days.

9 MS. MULLIGAN: So, Lance, I don't know if you
10 think we can work with that, and maybe it means that the
11 voting, people can vote the 12th, the 13th, the 14th, I
12 don't know.

13 MR. PLESSER: We have to build in a time for the
14 concurrences too.

15 MR. LANCE HOFFMAN: That's true.

16 MS. MULLIGAN: My hope would be that by the
17 second draft people would be on notice that perhaps they
18 should be writing a dissent. I don't think you're going
19 to go from a report you love to a report you hate
20 between the preliminary and the final draft.

21 MR. LANCE HOFFMAN: Can you reiterate those
22 dates one more time?

23 MS. MULLIGAN: I'm not tied to the dates. I was
24 thinking maybe the 3rd, the 5th and the 10th.

25 MR. SCHUTZER: Draft 1 on the 3rd, draft 2,

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1 5th. Does give you time to incorporate the comments?

2 MR. BAKER: I don't think it gives us time to
3 incorporate the comments.

4 MS. MULLIGAN: I agree it's an insane schedule.
5 We could push the 5th to the 6th. We could push the 5th
6 to the 8th.

7 MR. SCHUTZER: Push it to the 8th. Yes. So
8 draft 2 on the 8th. Make the next draft the 11th?

9 MR. DAVID HOFFMAN: I don't think we necessarily
10 need two drafts. We've already had a draft. We just
11 provided a ton of comments. People have already
12 provided comments to all the things that went into the
13 draft.

14 MR. SCHUTZER: I think we need it because we had
15 a lot of substantial discussion.

16 (Discussion off the record.)

17 MR. MEDINE: Who wants to comment?

18 MR. SCHUTZER: In other words, my feeling is we
19 had a lot of substantial discussion so I have faith in
20 the drafting committee. They're going to try to take
21 all these comments which means that the next draft will
22 be probably somewhat substantially different, and then
23 we would all like to read that and provide comments
24 again which mean they have to integrate all those
25 comments to have like a final draft we feel comfortable

1 voting on I think with some minor changes. I really do
2 think Deirdre is right, it probably takes two drafts.

3 MR. MEDINE: Jim?

4 MS. MULLIGAN: I think it probably takes two
5 drafts.

6 MR. MEDINE: Jim?

7 MR. TIERNEY: I agree with that and would like
8 to also put a little caveat on it that might solve some
9 of the confusion we're having, and Frank embarrassed all
10 of us over here unfortunately off the record and said
11 maybe we should do something by fax, which was a 20th
12 century device that was developed for reasons which
13 we've all forgotten.

14 I think we can do this by email. I have a
15 suggestion, a humble suggestion. I am as I stated
16 before and as you all know, if you don't know you will
17 soon, a deep adherent to using Microsoft products, and
18 on my Microsoft email product, there are two buttons.
19 One says reply and the other says reply to all.

20 Now, part of the confusion I think we're all
21 having logistically is many of us think our reply is so
22 valuable we hit reply to all, and as a result, people,
23 it is a huge mess because people who are responding to
24 things they got not four or five days ago but four or
25 five hours are irrelevant.

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1 It's very confusing, so again we come back to
2 the fact that if we have faith in our eight person
3 committee, if we try to keep our remarks -- and I will
4 be making comments, but I will be directing them only to
5 that committee, I think it would be much less confusing
6 and allow them the opportunity to synthesize them in a
7 rational way, and that makes the second draft more
8 important because in a sense by delegating this
9 authority to the committee, we're asking them to use
10 some judgment here in synthesizing this.

11 So that would I think clarify a lot of what I
12 see as just confusion because, this will be a shock to
13 many of you, but I don't read all of the emails that
14 you send. So this would make it a lot easier I think
15 for those.

16 MS. MULLIGAN: On that process issue, I would
17 like to suggest that we set up a system, for example,
18 I'm commenting on access section 2, so that we can sort
19 all of them and look at all the access section 2
20 questions so that the comments are things that are easy
21 for us to incorporate.

22 MR. MEDINE: We will also make efforts to put on
23 our web sites the drafts to help those who have delayed
24 email, and others obviously are free to post it on
25 their web sites if they want as well, but we will

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1 certainly make best efforts to try to avoid ancient
2 technologies and --

3 MR. WHAM: From a process standpoint if you're
4 going to have them up on the web site you need to keep
5 them out of PDF. You need to keep them in an editable,
6 document Word documents I think, unless anybody has a
7 problem with that.

8 MR. MEDINE: One second. One second. Fred?

9 MR. CATE: I just wanted to I think second what
10 is now the amended what I'm going to take as a motion
11 from Deirdre with the deadlines being the 3rd, the 8th
12 and the 11th with the assumption being that responses
13 will go back only to the drafters and not be distributed
14 to everyone and that concurrences or dissents or
15 whatever we're calling the separate statements would be
16 delivered sometime in the period between the 8th and the
17 11th.

18 So that the drop dead date for receiving those
19 would be the 11th so that others could see them and
20 consider them when voting. So if that was the motion as
21 it now stands amended, I would like to second it.

22 MS. SWIFT: I say we move to a vote.

23 MR. MEDINE: Motion, comments? Jonathan.

24 MR. JONATHAN SMITH: I have a question though
25 which is I've somehow lost in my brain the structure and

1 role of these comments, where they will end up in our
2 documents can someone reiterate.

3 MR. MEDINE: Talking about the individual
4 committee members comments.

5 MR. JONATHAN SMITH: That's correct.

6 MR. MEDINE: The comments on the report, those
7 will be standard at the end of the report. They will be
8 transmitted to the Federal Trade Commission, and they
9 will be transmitted along with the Federal Trade
10 Commission's larger report on online privacy which will
11 be copies of the committee's work.

12 MR. JONATHAN SMITH: Will those be voted on?

13 MR. MEDINE: I'm sorry, what is that?

14 MR. JONATHAN SMITH: Are those outside the scope
15 of the vote? I'm trying to understand.

16 MR. MEDINE: I don't think you'll be voting on
17 individual statements which includes individual
18 statements. You will be voting on the whole package.

19 MR. JONATHAN SMITH: What is the date for those
20 statements?

21 MR. MEDINE: What I'm hearing is the 11th, 11:59
22 Eastern Standard Time.

23 MS. CULNAN: And they go to the drafting
24 committee go to the drafting committee or to --

25 MS. MULLIGAN: I think we can go straight to the

1 FTC.

2 MR. LANE: We're not going to edit.

3 MS. MULLIGAN: Actually I don't know. They have
4 to go to you, but I think Fred made an important point,
5 that they should be available so they can inform as
6 Steve said other people's deliberations.

7 MR. MEDINE: Right, which we'll do at the same
8 time the final report is circulated.

9 MS. MULLIGAN: Right. Well --

10 MR. MEDINE: Or earlier, preferably but no later
11 than the 11th.

12 MR. COLE: In that vein, you characterized the
13 vote as a vote for transmission of the report to the
14 Commission. Is that the vote that you're expecting to
15 vote on?

16 MR. MEDINE: That's what I propose the committee
17 do which this committee -- members will have stated
18 either their views will be reflected in the body of the
19 report or in their individual statements, so the vote
20 would be to transmit that report along with the
21 attachments, individual sections to the Federal Trade
22 Commission.

23 MR. GAVIS: I thought actually the reason
24 for having individual statements was because we
25 were thinking that we were going to have a report that

1 was not going to reflect a lot of different options,
2 that we were going to end up coming up with
3 recommendations in the report, and ultimately people
4 were going to write their own recommendations later.

5 My sense is that I think it would be much better
6 if we created a report that really stood for the group
7 and that individual statements if anyone wanted to write
8 a letter on the public record they could do that and get
9 it submitted with the public comments.

10 But my sense is is that attaching lots of
11 different statements and having lots of different
12 conflicting views, et cetera, is going to be very
13 confusing for the public when they read it and may sort
14 of serve cross purposes for us.

15 MR. MEDINE: Just let me reflect the prior
16 discussion which is that people did feel -- hopefully
17 people's view will be represented in the report and
18 won't be a need for any statements, but people seemed to
19 feel at a prior meeting strongly that they at least have
20 the opportunity to submit an individual statement if
21 they felt the report didn't fully reflect all the
22 options or views or pros and cons that they felt about
23 the particular issues so again --

24 MR. COLE: I feel strongly we should stick to
25 that prior discussion, but I think we should clarify.

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1 One of the reasons someone may choose to file a comment
2 or whatever you're calling it is not because they think
3 all the views weren't reflected, but they want to
4 comment on the sum total of the report and its meaning
5 to them or it's implication or whatever else the First
6 Amendment allows them to say.

7 MR. MEDINE: Right. We will not edit your
8 comments. They will be attached to the report as
9 submitted, so you can say what you want in those.

10 MR. SCHUTZER: Before you call it to a vote, I
11 would like to make two comments. One is that I think we
12 shouldn't be talking access 1, 2, anymore. Let's talk
13 about the whole report as edited so I can see the whole
14 report, number 1.

15 Number 2, for some of you who might get confused
16 if it's reply to all but I find that a good process for
17 me to absorb and understand and keep track of what
18 everyone is saying. It doesn't mean that I will be
19 commenting, editing. The onus will be on the
20 drafting committee to take care of all of those things
21 and produce the next version, but I would appreciate a
22 reply to all so I can see what's going on and just
23 absorb it.

24 That's the way I synthesize this thing.

25 MR. MEDINE: Yes?

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1 MS. MULLIGAN: Can I respond to that? I'm not
2 suggesting not to reply to all. It's in the sorting, if
3 we get -- if every single person makes 300 little
4 comments throughout the entire document, that if we can
5 sort them so that we can look at the preface comments.

6 MR. WHAM: You can actually do a merge within
7 Word.

8 MR. SCHUTZER: Nobody else but the drafting
9 committee, but for the rest of us we want to see what's
10 going on .

11 MS. MULLIGAN: I want you to see what's going
12 on, but if the email subject lines allow us to sort so
13 we can make sure, okay, we looked at all the comments
14 that were relevant to the security section, it's very
15 helpful, having done this before.

16 MR. SCHUTZER: There shouldn't be sections
17 anymore. There should be comments on the draft because
18 it's all integrated.

19 MS. MULLIGAN: Absolutely. But the draft will
20 still have subtitles.

21 MR. MEDINE: Let's slow down comments so the
22 court reporter can keep up. Ron?

23 MR. PLESSER: Yeah, just a couple procedural
24 questions before we go on to vote. I mean, there's been
25 some assumptions around the table asserted about eight

1 people on the drafting committee. Lance certainly made
2 a recommendation. I don't think we've had a full
3 discussion of how that will be resolved at all.

4 I think there's been some assertions about it,
5 but I don't think it's been a discussion, number 1.
6 Number 2, I do think that while we do need to come back
7 to this conversation of whether or not we try to do a
8 summary, whether or not we try to do some kind of
9 preface so that we have instructions on the other four
10 things, I think we need to get some instructions on
11 those two things because those are substantive.

12 So I'm happy to talk about those things
13 substantively, but if you want to have a vote on the
14 dates, that's okay, but I think those other things
15 almost either come first or have it to be resolved as
16 well.

17 MR. MEDINE: It might not be a bad idea to
18 resolve this so when people vote they know what the
19 process is that's going to lead to the various drafts
20 being circulated, and we will be responsible for this.
21 That seems to be an advisable approach, but Deirdre?

22 MS. MULLIGAN: I actually just wanted to second
23 Lance's suggestion that we were anxious, we thought we
24 had the authority to dump the document together. We
25 didn't feel like we had two people from each subgroup.

1 We wanted make sure that we had the people who the
2 subgroup -- I've said, yeah, I'm happy to do it. My
3 subgroup didn't say, Deirdre, can you do this for us.

4 And we wanted -- it's an authority issue, and I
5 would like to have two people that the subgroup would
6 like to have represent them.

7 MR. MEDINE: Could we go to the four subgroups
8 now and poll them for who they would like. Yes, Mr.
9 Kamp?

10 MR. KAMP: Yes, I think we ought to do that, but
11 I suggest we have a subgroup for a preamble, but I
12 presume we're going to have to have a preamble
13 discussion. I'm going to strongly recommend that we do
14 a preamble. I think we have to have an explanatory
15 position there.

16 I'm not trying to take a position on any one
17 thing, and I also would like to recommend that Frank
18 Torres be one of the two, and that Ron Plesser be the
19 other of the two in that preamble discussion.

20 MS. MULLIGAN: I actually would like to make a
21 counterproposal, that the preamble and summary should be
22 part of the drafting assignment of the people who are
23 responsible for drafting so that the document's
24 consistent.

25 MR. MEDINE: That can be consistent with the

1 recommendation if that's what people want and have Frank
2 and Ron represent those concerns. Dan and then Lance.

3 MR. JAYE: We've been talking about how much
4 work we have yet to get done, and we started off the day
5 talking about how difficult it was to do the data
6 reduction to come up with an executive summary versus a
7 preface that talked about our process.

8 And I'm going to sort of suggest that we take
9 the Gordian Nod approach here and commit the sacrilege
10 of issuing a report that has no executive summary. That
11 basically forces everyone to wade through the details,
12 that there's a lot of important points that everyone has
13 brought up here, and that any attempt to try to reduce
14 it to some summary is going to basically eat up what
15 limited time we have left to produce the report and
16 arguably be less informative to the critical targets of
17 this report, so...

18 MR. MEDINE: Lance and then Greg.

19 MR. LANCE HOFFMAN: I could speak to that but
20 I'll let other people speak to that. What I want to say
21 is I think once people -- whoever we decide to put on
22 the drafting committee, once they're on the drafting
23 committee, they in essence lose their, if you will, status
24 as representatives except for they know what happened in
25 the subcommittees because at that point we're all --

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1 this is a subset of the entire group that has a task.
2 Its deliverable is to produce draft 1, draft 2 and
3 the final report. So that's the first thing.

4 In that regard I would argue against having two
5 more people to do what I call the preface because I
6 think this group now if we make sure it's
7 representative, and I would like to see before we leave
8 here and before in fact, Ron, we vote on this, who are
9 going to be the eight proposed people, whoever they are,
10 on the committee, and I'll stop there.

11 Once we do that I think we should be okay given
12 the constraints we're under.

13 MR. MEDINE: Greg, I'll call on you, but can we
14 maybe go through the four groups and put on the table
15 who they recommend and see if that maybe addresses
16 people's concern about representation. Access one?

17 MR. WHAM: I might recommend an alternative.
18 Instead of going through the four groups, who wants to
19 be on this drafting committee? I think if we may have
20 kind of a self selection, it will be obvious who.

21 MR. MEDINE: I think it will need representation
22 from each group.

23 (Discussion off the record.)

24 MR. LANCE HOFFMAN: Can I suggest a two minute
25 recess so the groups don't have to quibble in public?

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1 MS. MULLIGAN: I second that.

2 MR. MEDINE: Really two minutes because we're
3 getting --

4 (Discussion off the record.)

5 MS. SWIFT: Access subgroup 1 will have Richard
6 Purcell and Jamie Allen.

7 MR. MEDINE: 2?

8 MR. SHEN: Andrew Shen, for access 2 it will be
9 myself and Ron Plessner.

10 MR. MEDINE: 3?

11 MS. MULLIGAN: Rick Lane and Deirdre ?

12 MR. MEDINE: Four, security?

13 MR. BAKER: Stewart Baker and Lance Hoffman. We
14 also request that we be able to use Greg Miller as an
15 alternate because he has promised if we do that he'll
16 draft the preface.

17 MR. MEDINE: Which will be unobjectionable.

18 MS. SWIFT: We haven't totally decided on the
19 preface yet, and actually our sub group in nominating
20 our appointees, gave some direction to where we thought
21 they should go on those issues.

22 MR. MEDINE: So it's Richard Purcell, Jamie
23 Allen, Andrew Shen, Ron Plessner, Deirdre Mulligan,
24 Stewart Baker and Lance Hoffman. Ron?

25 MR. PLESSER: I would like to make a

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1 suggestion. When you and I talked about this early on,
2 you said one of the reasons we put academics on here is
3 that they can help with the writing, and it is terrific,
4 and I am very positive that Lance is on it and he
5 certainly is a recognized academician.

6 MR. LANCE HOFFMAN: What's he going to say next?

7 MR. PLESSER: Fred Cate, who just left, is a
8 wonderful writer and has a lot of ability to pull it
9 together, make it a committee of nine or make him kind
10 of the officio or something. I would think having Fred
11 particularly with his talents pulled into the immediacy
12 of the process would be helpful and important. He knows
13 I'm doing it.

14 MS. MULLIGAN: Which committee was Fred on?

15 MR. SHEN: I think he was on access 2.

16 MR. PLESSER: Part of the problem is he was on
17 vacation for three weeks but he really -- anyway that's
18 my suggestion.

19 MS. MULLIGAN: How does access 2 -- Stewart and
20 I think the security group have a specific reason. Is
21 there consensus among the access 2 committee that that
22 would be good?

23 MR. PLESSER: I don't think he's being --
24 Fred's being presented as a representative of a
25 particular group. I think the sense too is that

1 everybody here is now kind of representing the whole. I
2 think Fred is very talented and it would be helpful, but
3 that's up to the group.

4 MR. MEDINE: Jim?

5 MR. TIERNEY: I often say I work for 50 equally
6 gifted and talented attorneys general, and I think it's
7 fair to say that we are all 40 of us equally gifted and
8 talented or we wouldn't be here, and I say that with all
9 respect to Fred.

10 I like the way this committee looks. I've
11 listened here for all these meetings, and I think that I
12 have such faith in this committee I have no doubt that
13 they might be able to out-source pieces of this as it
14 goes along in their discretion, and I think we ought to
15 let it go at that.

16 Fred is enormously capable, there are other
17 people who are enormously capable, and you ought to use
18 your judgment to go where you need to get the
19 information down to the drafting in your own
20 discretion. I don't think any of us will second guess
21 it.

22 MR. MEDINE: Fred can be an information
23 intermediary.

24 MR. PLESSER: He can be a resource.

25 MR. MEDINE: Are we comfortable with going with

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1 the eight as proposed and then having out-sourcing being
2 Fred and Greg as it seems appropriate?

3 MR. TORRES: Salute.

4 MR. MEDINE: So we have a group. Let me just
5 specifically address the issue of executive summary
6 versus preface, is it the -- I think we have a couple
7 alternatives. One is to delegate to the group the
8 drafting of an executive summary and preface if they
9 feel that's appropriate, circulate it and see if it's
10 something people can support or not or make a decision
11 here about that. Richard?

12 MR. PURCELL: Comments that were made briefly
13 in our huddle had to do with a couple things. First of
14 all, an executive summary essentially is designed to
15 state a conclusion, to state at a high level the
16 supporting arguments for that conclusion and point to a
17 document that has the due diligence that was used to
18 reach that conclusion. This is not the kind of document
19 that's going to support that.

20 Now, that being said, I think that it's
21 important that we may want to write -- I'm going to
22 throw another word on the table here. I think it's
23 important that we write a prologue to this report,
24 which provides the appropriate set up for readership,
25 and additionally we may want to at the -- we may want to

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1 break this into a chapter format in the sense that it
2 can be supported by a table of contents that provides
3 easy access to the depth of material that's going to be
4 supported in here.

5 And there's ways that the documentation
6 process can work to do that quite readily as long
7 as you use the right products and the best
8 products.

9 MR. KAMP: Owned by one company.

10 MR. WHAM: Not for long.

11 MR. PURCELL: Even then it would only be one
12 company.

13 I think the essence of what we're trying to get
14 at in the discussion around preface is how do we set
15 this up so the reader's prepared to address the material
16 in a contextually appropriate way? We can do that.
17 That's how -- that's what you use a prologue for.

18 You say, Here's the deal, you're about to read
19 something and here's the context within which this
20 should be read or under which it was written. We can do
21 that.

22 We can then provide a table of contents that
23 allows the user to quickly figure out what the format or
24 the structure of the document is and go to specific
25 places in that document for specific needs that they

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1 might have, and I think given that kind of a structure,
2 we may be able to accomplish this by picking it up as
3 pieces that have good structure to hold it together.

4 MR. MEDINE: I'm seeing a lot of nodding in the
5 room. I'm going to see if we can grab a consensus
6 before we lose it and say that -- at least give that a
7 try and see as the draft circulates if that serves their
8 needs.

9 MS. SWIFT: I just have another sort of deadline
10 piece. I think we agreed or we're assumed going to
11 agree, now that we've got the committee appointed that
12 we will have the first draft on the 3rd, the second
13 draft on the 8th, the third draft prepared by the 11th.

14 We have to add dates in between the time by
15 which you circulate the draft, you need all of us to get
16 comments to you so that you can then produce the draft
17 so they have to be a date between the 3rd and the 8th
18 and a date between the 8th and 11th just for the
19 functioning of the drafting committee.

20 MR. BAKER: Why don't we just circulate that,
21 leave that to the committee.

22 MR. MEDINE: I don't think that has to be a
23 formal voting matter. There is one other date though
24 that needs to be added which is the -- well, two dates:
25 The date that voting opens and the date voting closes by

1 email on the final draft.

2 So I guess I would propose that voting open at
3 12:01 a.m. on the 12th and close at 11:59 p.m. on the
4 14th.

5 MR. COLE: I thought the 15th.

6 MR. MEDINE: The 15th is the day it's due to the
7 Commission. Commission staff would appreciate knowing
8 and having that date to put everything together.

9 MR. PLESSER: Can you repeat that.

10 MR. MEDINE: Physically from the morning of the
11 12th to the evening of the 14th to complete voting so we
12 can deliver it to the Commission as the charter calls
13 for on the 15th.

14 MR. CERASALE: Eastern time?

15 MR. MEDINE: Yes, Eastern Daylight Savings Time.

16 MS. MULLIGAN: You're saying if we give it to
17 you on the 15th, you'll copy it and deliver it to the
18 Commission all on the same day?

19 MR. MEDINE: Yes, yes. You can conclude your
20 voting the last possible minute on the 14th and we will
21 come in fresh, bright and early on the 15th and take
22 care of getting everything copied and taken care of.

23 MR. KAMP: Delivery date, does that have
24 anything to do with Labor and Mother's Day on that
25 Sunday? Never mind. I'm sorry.

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1 MR. MEDINE: At least there's not Friday the
2 13th in there. Is that it?

3 MR. TORRES: David, one comment that I have.
4 Since email is not yet -- my system sometimes goes
5 down. Sometimes it takes a while to get things
6 circulated. I think as soon as we know what dates --
7 now that we know what dates the copies are supposed to
8 come out by email can we have -- do we call you if we
9 didn't get it so we can have another method to do that?

10 MR. MEDINE: Yes, you can call us.

11 MR. PLESSER: You can put the draft on the web
12 sites too.

13 MR. MEDINE: We'll put the draft on the web
14 sites too, but that does take some time as well, but we
15 will do our best to get that done as quickly as possible.
16 If you haven't received your email call us. We will
17 fax it to you or if you're local make it available on a
18 hard copy for you to pick up, whatever we can do to
19 assist you in getting it as quickly as possible.

20 MR. TORRES: I would suggest the same thing with
21 the votes. I take it that if you see that certain
22 people haven't or you haven't received emails from
23 certain people, there could be lots of reasons for the
24 glitches, that you all make the call.

25 MR. MEDINE: That will be a little trickier

1 because we're calling for a vote over the weekend, so
2 you can have an option if you want of calling or faxing
3 your vote in or --

4 MR. LANE: I was going to say because you may
5 have sent it over the weekend. It may not go through
6 for some reason. You don't know about it so I would
7 think that at ten o'clock on Monday morning if you
8 haven't received a vote from Frank or myself or somebody
9 on the committee, maybe give us a call because we may
10 have thought it went through and there's no way to track
11 it.

12 MR. MEDINE: Just for formality, I'm going to
13 suggest that the voting deadline be noon on Monday,
14 though with an aspiration that everybody complete their
15 votes on the 14th so that we only have to do catch up
16 reminder kind of calls Monday morning on the 15th. We
17 will make best efforts to vote by 14th but I don't want
18 to be past the voting deadline where we're taking late
19 votes and have a dilemma of counting them or not
20 counting them.

21 MS. CULNAN: One quick question. The drafting
22 committee will decide who's going to email it out and
23 basically we'll know to whom to reply and remind us
24 about putting what in the headers of the message to make
25 your job easier?

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1 MR. PURCELL: Yes.

2 MR. CERASALE: The response is to go to one
3 person? I had a note that David asked them to have the
4 FTC send us an email with the specific email addresses
5 of the eight on the drafting committee so I don't have
6 to try and figure out what they are.

7 MR. PURCELL: That's fine.

8 MR. CERASALE: Let's get it. But how do you
9 want it? Do you want the email to just one person or
10 all eight?

11 MS. MULLIGAN: No. What I would propose to do
12 is when we send out the preliminary draft we will have
13 everybody in the cc line that you should respond to so
14 that if you reply to all, it will come back but what
15 we'll ask.

16 MR. CERASALE: No, it won't. It will go to
17 everybody on the list.

18 (Discussion off the record.)

19 MS. MULLIGAN: I'll give you the addresses in
20 the cc line and you can take them and paste them in so
21 you only reply to the cc or --

22 MR. PURCELL: May I make a suggestion, that the
23 designated federal officer can set up an alias that all
24 eight people would be included on so you have a single
25 draft ACOAS email address so that will make it much

1 less difficult?

2 MR. MEDINE: Your DFO would be happy to do that.

3 MS. BROWN: The problem is if somebody emails
4 something at 8 p.m. to the advisory committee, email
5 backs, it may be maybe 8:30 the next morning before I
6 send it out to the drafting committee so you may --

7 MR. MEDINE: We can create an automatic
8 forward?

9 MR. PURCELL: Yes, you can.

10 MR. MEDINE: We will forward it to the drafting
11 committee.

12 MR. PLESSER: One thing is I do think from my
13 own perspective since I am not a good note taker, I
14 think a lot of people have very good comments today, and
15 we have some of those notes but before the beginning of
16 next week if people could email to me and I assume to
17 others kind of the hit list of the definitions that need
18 to be played with, your kind of suggestions or
19 recommendations on going through here and again over the
20 weekend so if we can get that on Monday, Tuesday, I
21 think that would be much easier, would be very helpful
22 to me to see the substantive comments, not that everyone
23 will be taken but I think it will give us some guidance.

24 MR. MEDINE: Your DFO would also like to suggest
25 a service to the committee, if you like, given the rich

1 discussion we had today, we would be willing to email
2 the transcript of today's session on Monday with the
3 caveat that it's uncorrected it might be helpful in your
4 deliberation.

5 We'll also obviously post an edited version when
6 we've had a chance to review it, but it sounds like because
7 of the pace we're on it might helpful once we get it in
8 to email it to the group. I'm seeing lots of nods so
9 we will do that.

10 MR. TIERNEY: I had one specific question again
11 logistically, if I'm to comment on three different
12 sections of the report, is it your suggestion to us that
13 I send you three separate emails?

14 MS. MULLIGAN: Yes.

15 MR. TIERNEY: I thought that's what you said. I
16 wanted to make that clear.

17 MS. MULLIGAN: Yes, and I think when we send out
18 the directions for how to comment on the attached
19 document, it will give you very specific details about
20 what to put in the subject line, and I know it's a
21 little bit of a hassle on your end, but it's way more of
22 a hassle on our end and it will make sure that we
23 actually get to everybody's comments.

24 But to just go off of that, I think it's
25 important that we get those second dates that you talked

1 about. I don't want to wait and send you guys out a
2 note that says, oh, you have ten hours to respond, so
3 for example, if we're going to get the preliminary draft
4 out to you at 5:00 p.m. Eastern Standard Time on the
5 3rd, I want people to have comments back to me by 5:00
6 p.m. on Thursday the 4th.

7 I know it's 24 hours but if each one of you
8 makes 12 comments, it's a lot more for us to incorporate
9 than it is for you to read a document, and so we get the
10 bulk of the time, not the commenters. So if I can
11 suggest that we put a deadline -- I'm happy to do
12 Thursday at twelve o'clock Pacific Standard Time.

13 MR. LANCE HOFFMAN: Thursday what?

14 MS. MULLIGAN: The document that will go out on
15 the 3rd, you have until midnight Pacific time Thursday
16 to get comments back which means 3:00 a.m. in the
17 morning for those of you who really like late nights on
18 the East Coast.

19 Draft 2 which goes out on the 8th, similarly
20 comments should be back to us on the 9th by midnight
21 Pacific Standard Time.

22 MR. PURCELL: That gives us 48 hours to
23 complete the task.

24 MS. MULLIGAN: I know it's a little more than 24
25 hours on the other side, but I really think that's what

1 we need to do if we're going to be able to do it.

2 MR. MEDINE: I'm sorry, comment to the drafting
3 committee for the first draft should be submitted when?

4 MS. MULLIGAN: Monday the 1st, 12 Pacific
5 standard, midnight Pacific standard.

6 MR. RICHARD SMITH: When you send out the draft
7 will you remind us?

8 MS. MULLIGAN: Yes.

9 MR. GAVIS: Do you want comments right in the
10 Word document, or do you want them in the email?

11 MS. MULLIGAN: I would prefer if people put
12 changes in the email. There's too many people. Even
13 if we use track changes we will not be able to keep
14 track of them.

15 MR. GAVIS: No Word in email.

16 MS. MULLIGAN: Sorry.

17 MR. LANCE HOFFMAN: Quick suggestion to the
18 Commission. I suggest when you get a vote you
19 acknowledge the vote to somebody and that way you'll cut
20 down on your back and forth.

21 MR. ALLEN: What is the voting process, and will
22 there be any visibility to the committee members during
23 the voting period as to the status of the vote?

24 MR. MEDINE: Well, the email should be sent to
25 advisorycommittee@ftc.gov. I suppose you can copy

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1 the others.

2 MS. SWIFT: You won't ask for a vote. You will
3 assume we know to start voting.

4 MR. MEDINE: We're going to entertain a motion
5 that there be a period of time during which votes will
6 be received so people will send an email during that
7 period of time to record their vote. You're all free to
8 copy each other on your voting email.

9 MR. COLE: When you're ready for that motion, I
10 would like to suggest that you tickle your calendars to
11 send everyone a reminder that voting is now open.

12 MR. MEDINE: Okay.

13 MS. CULNAN: Then people will know --

14 MR. MEDINE: Jonathan?

15 MR. JONATHAN SMITH: On the voting process I may
16 not be email capable at that time. Is it possible --
17 is it acceptable to telephone call in?

18 MR. MEDINE: The problem with the phone call is
19 the record.

20 MS. CRANOR: I have the same problem.

21 MR. MEDINE: Fax.

22 (Discussion off the record.).

23 MS. CRANOR: I have the same problem. I may not
24 have email during those three days.

25 MR. MEDINE: What about fax?

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1 MS. CRANOR: I may not have fax either. I'm
2 going to be traveling. I don't know what I'm going to
3 have.

4 MR. MEDINE: I think it's difficult --

5 MS. CRANOR: I could definitely have a phone. I
6 could call somebody.

7 MS. SWIFT: Can I ask a question, maybe this is
8 not the thing, but don't you have somebody who can just
9 go to your computer and send an email from it?

10 MS. GAU: That's authenticity.

11 MS. MULLIGAN: Lorrie, if you would like to call
12 me, I would be happy to transmit your vote. If you would
13 like to call me, I would be happy to transmit you vote.

14 MS. CRANOR: Okay.

15 MR. JONATHAN SMITH: Is that acceptable?

16 MR. MEDINE: Yes.

17 MR. JONATHAN SMITH: You're happy with that.

18 MR. GAVIS: When is the report going to be made
19 public?

20 MR. MEDINE: On the 15th I believe.

21 MS. GAU: I'm sorry, David, I thought prior to
22 the vote we were going to actually see what the entire
23 package would look like, including any dissents that
24 were going to be part of the materials.

25 MR. MEDINE: Comments, that would be by the

1 11th. Maybe I can summarize where I think we are.

2 MR. LANCE HOFFMAN: Before you do, one question
3 on the vote, David, I'm sorry? Is the vote going to be
4 a rolling, that is, if person number 1 votes on the
5 minute one after voting is open and then voting is open
6 for two or three days, okay, is everybody going to see
7 each person's vote as they come or are they going to
8 come in and be closely held until the end?

9 MR. MEDINE: Again because this is occurring
10 over the weekend, what I would suggest is the members of
11 the group copy each other on their email so you can
12 see, but it will be very difficult for us to have it be
13 a public process.

14 MR. WHAM: Based upon what we're doing here,
15 where we're trying to do achieve a consensus where we've
16 got three drafts all the way through, where we get to
17 have individual comments, can anyone see a situation
18 where you're not going to vote to a yes? Isn't it
19 pretty clear that everyone is going to say yes?

20 MR. JONATHAN SMITH: No, you're right.

21 MR. MEDINE: We reserve that question to you.
22 You have a chance to record your vote.

23 MS. MULLIGAN: Send the no votes to everyone on
24 the list.

25 MR. LANCE HOFFMAN: What if a hacker did that?

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1 MR. MEDINE: So if I could summarize where I
2 think we are. The first draft will be circulated on the
3 3rd, comments to the drafting committee by the 1st
4 (sic).

5 The second draft will be circulated on the 8th.

6 MS. GAU: Wait, 3rd and to the 4th.

7 MR. MEDINE: 5/1 midnight, comments due to the
8 drafting committee. 5/3 the drafting committee will
9 circulate the first draft.

10 MS. MULLIGAN: Yes, end of day.

11 MR. MEDINE: Comments are due back to the
12 drafting committee the next day, 5/4 midnight. The
13 second draft will be circulated 5/8, comments due back
14 midnight 5/9; final draft to be circulated along with
15 individual comments, those who choose to make them, 5/11
16 midnight, voting opens 12:01 a.m. on the 12th of May,
17 voting closes at 11:59 a.m. at noon on the 15th of May.

18 We are encouraging people in good faith to vote
19 by midnight on the 14th so when we come in on the 15th,
20 those who have not voted we will make our best efforts
21 to contact and make sure that --

22 MR. PLESSER: Will you draft up the voting
23 statement because I think it's really your job to do
24 that and then circulate it so we know exactly what we're
25 saying yes and no to?

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1 MR. MEDINE: We would be happy to do that.

2 MS. CULNAN: The other question is I have
3 written down that we're supposed to send our comments if
4 we choose to make them to the FTC on the 11th. And so
5 at that point how will they -- are they going to then be
6 sent back to you to be put into the final package?

7 MS. MULLIGAN: There's a question. I think --
8 could we have.

9 MS. CULNAN: We cc you?

10 MR. MEDINE: 5/10, would that be easier?

11 MS. MULLIGAN: Yes.

12 MR. MEDINE: Individual comments 5/10.

13 MS. CULNAN: To the drafting group?

14 MS. MULLIGAN: Here's the question. I think if
15 it's amenable, and I have to talk to the group, I have
16 commandeered our web person to do a nice Quark
17 version of this so the report looks good which we could
18 then turn into a report to send to you all.

19 I don't necessarily feel like we need to also
20 handle all the individualized statements. You've
21 already created a template, et cetera, so if those were
22 just sent directly to the Commission, that's okay, and
23 make sure that -- it lessens the risk that there's a
24 transmission error because it's only going one step
25 instead of two.

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1 MS. CULNAN: The question is how do they get
2 into the final package that we see to vote? If they're
3 going to the FTC and you have the final report, is the
4 FTC going to send it out?

5 MR. MEDINE: We will send them out or post them
6 on the web site by close of business on the 11th.

7 MS. MULLIGAN: Or maybe the individual
8 statements do go to the full committee.

9 MR. MEDINE: Again you're always free to copy
10 your fellow committee members on anything you send.

11 MR. COLE: I think we're getting a little
12 confused. It seems to me when we're asked to or we're
13 encouraged or allowed to send comments, we would like to
14 see the final report to which you're commenting, so it
15 seems that the comments ought to be following the
16 distribution of the last draft, and then those comments
17 plus the last draft get voted on. The comments wouldn't
18 get voted on, but you would see the whole package when
19 you vote.

20 MS. SWIFT: I think the problem is we're not
21 sure we have enough time to do that.

22 MR. WHAM: And I think we'll be close enough on
23 a final that it's not necessary to see the absolute
24 final draft.

25 MS. MULLIGAN: My hope is that the only changes

1 we're making on the final draft are really we missed
2 typos, that they were -- my hope is that the first draft
3 and the second draft are the ones that we're really
4 shaping, and that the third draft -- you should know.

5 MR. LANE: Technical corrections.

6 MR. COLE: That's never been my experience. I
7 know there's always been a hope.

8 MR. MEDINE: You know. We're losing people, and
9 we have to take a vote while we still have a quorum or
10 there will be no report.

11 MS. MULLIGAN: I would propose that we could try
12 --

13 MR. MEDINE: I would suggest we lock in a vote
14 before people leave.

15 MS. MULLIGAN: Can I make a motion?

16 MR. MEDINE: We will have no report if we don't
17 have a vote with a quorum?

18 MS. MULLIGAN: On behalf of the drafting group,
19 unless somebody else shoots me down, that we could say
20 that we could get the final report circulated by the
21 11th at 4 p.m. Eastern Standard Time so that people
22 could make their comments if they wanted to subsequent
23 to having that and still get them in by Thursday at
24 midnight Pacific Standard Time.

25 I know it means that you're going to be working

1 after hours.

2 MS. SWIFT: You know what, I really think we're
3 going to have vote right now, before people are missing
4 their planes, as to whether or not when we adhere to
5 this process, whatever the deadlines are, we agree to
6 take a vote, the process that's been established in
7 order to submit a report directly to the Commission.

8 MR. LANE: I second that motion.

9 MR. MEDINE: Let's take a vote. James Allen?

10 MR. ALLEN: Aye.

11 MR. MEDINE: Stewart Baker? Jerry.

12 MR. CERASALE: Do you have to do a roll call?

13 MR. MEDINE: All in favor say aye?

14 (Chorus of ayes.)

15 MR. MEDINE: Opposed say no.

16 (No response.)

17 MR. MEDINE: Majority. Thank you very much.

18 (Time noted: 4:31.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

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3 DOCKET/FILE NUMBER: P004807

4 CASE TITLE: ONLINE ACCESS AND SECURITY

5 HEARING DATE: APRIL 28, 2000

6

7 WE HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by us at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of our knowledge
11 and belief.

12

13

DATED: MAY 1, 2000

14

15

SUSANNE Q. TATE, RMR

16

17

DEBRA L. MAHEUX

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

20

21 I HEREBY CERTIFY that I proofread the transcript
22 for accuracy in spelling, hyphenation, punctuation and
23 format.

24

25

DIANE QUADE

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Waldorf, Maryland
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