FEDERAL TRADE COMMISSION

ADVISORY COMMITTEE ON
ONLINE ACCESS AND SECURITY

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MR. MEDINE: Good morning. Okay, thank you. Thank you all for all of your diligent efforts, and welcome to what I believe will be the last meeting of the advisory committee. I guess we'll know that at the end of the day, but I think we've made substantial progress and it is our hope to wrap up as much as we can today.

Let me first call the roll.

James Allen?

MR. ALLEN: Here.

MR. MEDINE: Stewart Baker?

MR. BAKER: Here.

MR. MEDINE: Christopher Curtin?

MR. CURTIN: Here.

MR. MEDINE: Paula Bruening?

MS. BRUENING: Here.

MR. MEDINE: Steve Casey?

MR. CASEY: Here.

MR. MEDINE: Fred Cate?

MR. CATE: Here.

MR. MEDINE: Jerry Cerasale?

MR. CERASALE: Here.

MR. MEDINE: Steve Cole will be late.
Lorrie Cranor?

DR. CRANOR: Here.

MR. MEDINE: Mary Culnan?

DR. CULNAN: Here.

MR. MEDINE: Tatiana Gau?

MS. GAU: Here.

MR. MEDINE: Alexander Gavis?

MR. GAVIS: Here.

MR. MEDINE: Daniel Geer?

DR. GEER: Here.

MR. MEDINE: Rob Goldman?

MR. GOLDMAN: Here.

MR. MEDINE: David Hoffman?

MR. DAVID HOFFMAN: Here.

MR. MEDINE: Lance Hoffman?

DR. LANCE HOFFMAN: Here.

MR. MEDINE: Josh Isay?

MR. ISAY: Here.

MR. MEDINE: Dan Jaye?

MR. JAYE: Here.

MR. MEDINE: John Kamp?

MR. KAMP: Here.

MR. MEDINE: Rick Lane?

MR. LANE: Here.

MR. MEDINE: James Maxson?
Greg Miller?

MR. MILLER: Here.

MR. MEDINE: Deirdre Mulligan?

MS. MULLIGAN: Here.

MR. MEDINE: Deborah Pierce?

MS. PIERCE: Here.

MR. MEDINE: Ron Plesser?

MR. PLESSER: Here.

MR. MEDINE: Larry Ponemon?

MR. PONEMON: Here.

MR. MEDINE: Richard Purcell?

MR. PURCELL: Here.

MR. MEDINE: Peter Reid?

MR. REID: Here.

Art Sackler will be late.

Dan Schutzer?

MR. SCHUTZER: Here.

MR. MEDINE: Andrew Shen?

MR. SHEN: Here.

MR. MEDINE: Richard Smith?

Jonathan Smith?

Jane Swift?

MS. SWIFT: Here.

MR. MEDINE: Jim Tierney?

MR. TIERNEY: Here.
MR. MEDINE: Frank Torres?

MR. TORRES: Here.

MR. MEDINE: Tom Wadlow?

MR. WADLOW: Here.

MR. MEDINE: Ted Wham?

MR. WHAM: Here.

MR. MEDINE: Rebecca Whitener?

MS. WHITENER: Here.

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

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

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

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

In terms of public comments, we've continued to receive comments from members of the public, and as of yesterday afternoon, we had received 26 comments to the committee. They are all posted on the committee's web page at www.ftc.gov/acoas. The public comment period...
for the advisory committee ends today at 5:00 p.m. eastern time, and so as we work towards finalizing the report, we would encourage you all to continue to check the page certainly through the end of today and consider any public comments that are submitted to the committee.

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

If you are submitting individual statements, which again, based on our last session, everyone is free if they wish to include a separate statement which will be attached to the report and delivered to the Commission, you are certainly free to do so. We ask that you provide us a PDF version of your individual
statement, or alternatively, send us a hard copy overnight to Allison Brown, who's back there, to her attention for receipt by no later than May 15th, ideally much sooner than that, for processing and inclusion in the final report. The FTC will be responsible for publishing the final report, but obviously we need to get your statements and the report itself as soon as possible.

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

So, the proposed schedule that we are recommending, and I think it derived in large part from the discussion last time, is as follows, and I suppose we will be revisiting this at the end of the day to see where we are, but at least as of now, we're proposing that by close of business May 3rd, at 5:00 eastern
time, is the deadline for the subgroups to submit their revisions to Deirdre. May 5th at noon, Deirdre will e-mail the document to the -- the compiled and edited document to the advisory committee mailbox, which will then be distributed to all the committee members, and a vote will be called for. May 10th at 5:00 p.m. will be the deadline for voting by e-mail on the final report, and again, that will give us time to put the report together and deliver it to the Commission on time by May 15th.

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

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

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

I thought while we had planned on probably delving into the substance of each of the subgroups'
sections, based on the e-mail traffic, particularly yesterday, I guess I would suggest that we jump into the issue right up front of both questions that were raised about how the committee's report will be used and what its purpose is and so forth and the question of any kind of summary or executive summary or introductory statement that might be included.

Is that -- is the group amenable to that?

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

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

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

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

I don't know if people want to discuss that
particular issue first. That's at least the staff's view here of the purpose of this committee, and I think it's been a pretty consistent one.

Ron Plessner?

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

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

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

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

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

Thank you.

MR. MEDINE: Okay.

Other comments?

Go ahead.

MR. TORRES: Frank Torres from Consumers Union.

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

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

One, who was doing the initial drafting of this? I'd be curious to find out. And second, I did note that yesterday Andrew Shen sent around a suggestion, and I have no problem with a document describing the process that we went through provided
that all of us feel comfortable in signing onto that, 
but as Andrew suggested, perhaps it's more appropriate 
to be put in the form of a transmittal letter rather 
than something that is, you know -- because to me, the 
summary of the document should be just that, a summary 
of a document, not, "Congress, don't use this at all 
for any legislative purpose whatsoever."

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

MR. MEDINE: Deirdre?

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

I was particularly interested because at the 
last meeting I think we strategically decided that it 
was going to be very hard to summarize a document the 
contents of which were as yet uncertain, and, in fact, 
I think that the procedural statements about what the
committee was to do are absolutely fine. The summary
of people's feelings, of the split among the committee,
I think is quite problematic, because as of yet I'm
uncertain about what the committee is going to decide
and what the splits actually are.

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

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

Lance?

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

MS. SWIFT: Jane Swift.

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

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

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

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

MR. MEDINE: Stewart?

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

It seems to me that we might be able to agree
on something like the text that has been circulated and
marked up to the extent that it's dealing not with
trying to summarize the options and where the group
comes out but with the point that Ron has raised, which
is are we endorsing legislative action here, are we
suggesting legislative action. I think it's clear from
our charter that that's not what our job is, and there
are obviously people who would hate to have it
suggested that they were laying the groundwork for
legislative action, and with the exception of the
paragraphs that were marked, I think we're probably
pretty close to -- to that.

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

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

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

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paragraphs that Ron has bracketed in his draft and see if we think that that's close, and then separately consider the question whether we want to summarize it. Maybe we come back to that later in the day, whether we want to try to summarize this or not.

MR. MEDINE: Yes?

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

THE COMMITTEE: Yes.

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

MS. MULLIGAN: Two pages is the rule.

MR. MEDINE: Let me say that I can't speak for the outside world, but for the inside world I can assure you that a lot more will be read internally. In fact, a lot of people have been reading transcripts of these meetings and your drafts and so forth. So, I think you will get a pretty detailed read inside, but I don't dispute the point that many people read executive summaries and nothing more of reports.
But in terms of the Commission benefitting from your thinking, the Commission has already benefitted substantially from your thinking and the discussions to date, and I suspect that the report will get a close read inside. I obviously can't -- this has a broader audience than that.

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

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

Jerry and then Lorrie?

MR. CERASALE: In an earlier life, working for a regulatory commission that wrote, oh, 500-page decisions on a $60-plus billion a year rate case, the executive summary took longer than writing the rest of the report, and I think that, agreeing with Stewart,
doing a summary of this report is clearly going to make this not be the last meeting.

MR. MEDINE: Lorrie?

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

MR. MEDINE: Dan?

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

MR. MEDINE: Ted?

MR. WHAM: Ted Wham.

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

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

MR. MEDINE: Thank you.

Frank?

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

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

So, you know, if we can't come up with a clear
executive summary of what the options are, then I submit that we do no summary.

MR. MEDINE: Richard?

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

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

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

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

MR. MEDINE: Ron?

MR. PLESSER: Ron Plesser.

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

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

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

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

Thank you.

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

MR. PLESSER: Correct.

MR. MEDINE: Okay.

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

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

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people to go talk to at the break?

(Show of hands.)

MR. MILLER: Great.

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

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

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

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

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

MR. ALLEN: James Allen.

MS. WHITENER: Rebecca Whitener, IBM.

MR. DAVID HOFFMAN: David Hoffman, Intel Corporation.

MR. CERASALE: Jerry Cerasale, Direct Marketing Association.

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

MR. PLESSER: I have to say, I mean, I think it's good that everybody's owned up to the process. I
think, you know, when I joined -- this is Ron Pless...
views about it.

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

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

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

DR. GEER: Just a point of information. Could you make sure I -- that those of us who don't do this...
all the time know what you mean, Fair Information Practice, whether there are capital letters involved?

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

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

Stewart?

MR. BAKER: Let me start out the debate by arguing that what we have discovered in the course of this discussion is that access is probably the most difficult of all the Fair Information Practices that have been laid out. It raises real privacy concerns; that is to say, providing access is going to be a vehicle for consumer theft of identity, for invasions
of privacy for people who use computers jointly, for
other kinds of problems that people will face, as a
result of guaranteeing access.

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

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

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

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

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

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

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

MR. RICHARD SMITH: Yes, I just wanted to follow up on Stewart's remarks. Obviously there are a lot of angles on this story of access. I think the
important issue that I see that it brings to the party is some checks and balances against companies collecting data. A lot of times companies collect data whether they need it or not, and if they have to provide -- show what they're collecting, for two different reasons -- one is the cost to them, and as Stewart's already pointed it out, to provide access -- then they choose not to collect to begin with. So, I think it's a very good thing.

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

Thank you.

MR. MEDINE:  Jim?

MR. TIERNEY:  Jim Tierney.

Acknowledging Stewart's points that there should probably be caveats on all four of these points, I think that access is an integral part of Fair Information Practices, and I think we shouldn't move away from that, and for those of us who share Stewart's views that we should minimize government involvement in this industry, giving consumers the ability to access their own information, allowing consumers to access
their own information is obviously one of the fundamental ways for enforcement to be put in the hands of the people most affected.

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

Richard?

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

Richard Purcell from Microsoft, whoever that other one was.

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

I think the reasonable aspects have to be very carefully thought through, and this is another area where if we were to get overly broad mandates, we actually could end up contravening the principle itself by creating more holes in our privacy programs than there are securities, not unlike a lot of interference
with security programs where gaps are intentionally
created and then exploited for some later purpose.

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

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

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

MR. SHEN: Andrew Shen.

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

The first point, why do we need to correct this
information and why should consumers be able to correct
this information? And I think the obvious answer is because companies use that information, and companies don't collect this data, put it into databases, analyze the data, mine it, et cetera, et cetera, if they are not going to use it, and how they use it affects a consumer in some way.

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

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

And third is that really we can start

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

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

MR. MEDINE: Do you want to respond?

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

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

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

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

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

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

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

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

MR. BAKER: Yeah, it raises substantially the
cost obviously of access, and I guess I do disagree
with the suggestion that access is a good idea because
it costs money and it's a tax on collecting the data in the first place. If we thought it was a good idea to have a tax on collecting data, we could suggest that.

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

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

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

MR. MEDINE: James?

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

First of all, I believe very strongly that access is a fundamental part of the Fair Information Practices, has been defined as such for, as Andrew said, for certainly more than a decade, but, you know, it's very important -- I think the transparency that Richard referred to is also a very -- is, you know, a very important concept, that -- that trust between consumers and businesses, between businesses and businesses who do business with each other, is -- is
fostered by having a degree of transparency, of openness. It's what our society is sort of built on.

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

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

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

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

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

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

   MR. MEDINE: Thanks.

   Deirdre?

   MS. MULLIGAN: I wanted to actually chime in
with James' points. I have been quite heartened by the
number of times I've heard the words "fundamental
principle" used. I believe James used it, Richard,
Richard, Jim, Andrew, which is a cross-section of
people around this table, and my hope is that, in fact,
people did come to this table with the recognition that
the FTC's annunciation of access as a very fundamental
concept is a good starting point, but I think that as
Stewart has pointed out, there are some risks that we
do have to address, but I think that that doesn't make
them unaddressable.

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

So, I hope that we -- that I continue to hear
the notion that this is a fundamental principle, and
the question is, in what context -- in what cases does
it run into conflict with other principles? I think
there are areas where it does. It may expose someone
else's data. Areas where, you know, if you look at
something, even like the Privacy Act, we have concepts
of trade secrets, we have concepts of state secrets,
that there are areas where the access principle does
give way, but that does not mean it is not an important
principle and something we should be striving for.

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

DR. GEER: Thank you, Dan Geer.

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

I think where you were going, Stewart -- and if
I'm right, I'd like to know -- is that if we insist
that all data be treated as equally important, that if
it's about me, I have access to it, regardless of
whether it is the inadvertent visit to a website
because I didn't know how to spell or whether it's
because I am amending my birth certificate or anything
in between, and if we treat all of those things as
having an equal access requirement, the only way out
technically of which I am aware is what I would refer
to as identity culture in which everything I do has my
unmistakable, nonrefutable thumbprint on it in an
electronic sense.
I would argue that if we insist that all data be treated as equally valuable with respect to the requirement for providing access, then the only way to avoid a collapse of privacy is to step back and say our trade-off is an identity culture. I think that's dangerous. I'd be happy to debate that at length. I don't think it's the core issue today, but I just want to be careful that the law of unintended consequences doesn't take us in that direction. That is -- would make it worth -- avoiding that would make it worthwhile, my participation here.

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

MR. MEDINE: Sure.

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

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

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

MS. MULLIGAN: I don't think that's accurate.

I mean, we have seen --

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

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

DR. GEER: Absolutely, absolutely.

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

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

MS. MULLIGAN: Right.

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

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Ms. : Well, I think --

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

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

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

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

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

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

MS. MULLIGAN: I like violent.

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

MS. MULLIGAN: Stewart knows that.

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

MS. MULLIGAN: Strike all that.

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

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

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

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

MR. MEDINE: Dan?

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

There are -- one of the concerns I have is that there's an assumption that when a business or an organization is saying that access is not appropriate
in a certain case, that there is something underhanded
or there is something pejorative to the consumer going
on, and I just would want to make the statement that
often -- and in specific cases that I know of -- it's
specifically because the business is trying to do the
right thing. It's made a commitment to privacy. It
actually thinks that not providing access in certain
circumstances, given the fact that there may not be
synonymous authentication possible in those
circumstances, is the business specifically trying to
uphold its privacy policies.

MR. MEDINE: Okay, Dan?

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

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

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

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

It's something we will continue to strive to do better on, but we are sort of responsible to do our best to provide our customers access in a safe and secure way to maximize the chances of privacy, and we'll get better at it, and we'll have to take risks -- we'll have to take liability consequences when problems arise.
MR. MEDINE: Frank, and then Ted?

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

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

But falling short of that, and I doubt that we will reach that conclusion, that we do need to take a reasonable approach, and in that way I do concur with a lot of the comments that have been made, and if we remember that access doesn't exist in a vacuum, that,
you know, for some -- and I think Jim pointed this out, that, you know, for some, in getting to notice, that might make a consumer not reach the conclusion that they need access to the particular bit of information or the lines of code or something like that that shows where they -- where they've been.

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

I appreciate the concerns about will access lead to privacy intrusions, but to the extent that a lot of this information is collected, and as Andrew said some time ago, is being used, sold, shared, used to make decisions, then to me that shows that if the company can access it to digest it and sell it, then the consumer should also have access to it. So, maybe what I'm trying to get at is perhaps some places where we go for the reasonableness test, and I concur with
Deirdre that to the extent that many people around the table believe that access is a fundamental principle, that that's important.

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

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

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

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

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

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

MS. MULLIGAN: Principle, I said principle.

MR. WHAM: Principle, I won't be on that list either. Instead I think that access is much more of a
continuum, and to look at it and to describe it as a fundamental principle is to look at it and describe it in a very binary manner, and even putting the caveat to it reasonable access is to instead say, Well, you have got access in the following, you know, areas, but then it's binary within that area, and I think that that misses a lot of the different things that are proven.

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

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

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know what is being collected about you.

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

I want to take my customer who does the greatest amount of business with me, never returns a product, who always comes back and uses my service, and I want to answer the telephone call on the first ring for that guy, and I want the "Hoighty Palloighty" to be at the back of the line, that people who offer difficult problems for me, who are never happy with my service, who are coming through and are returning products, those are the people that I want to offer a
differentiated level of service. If that's called weblining, so be it.

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

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

The next thing that comes through from this is the access to whose data. Just because it's about me doesn't mean it's my data, and that harkens back to the example that I gave earlier that was a source of, you know, of another, you know, ribbing that I received before this meeting here this morning about, you know, what information I have about the other members of this
committee and the opinions and the inferences that I've
drawn about you within my private, you know, outlook
context, right?

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

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

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

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

At a minimum, I would not want to see a differentiated level of service where in an online setting you have to do that; offline, you don't have to do that. So, in total, to sum it up, access is a continuum; it's not a binary decision. It is something where it has privacy risks for the consumer. If I have an absolute right of access to information about my clickstream data, then presumably my employer can sit down at my
computer at work and say show me everyplace where this
computer has been, and an employer just out of the same
rights of law where they can see my e-mail stream and
make decisions about whether to fire me based upon my
e-mails, even personal e-mails, could can me based upon
because we have done the consumer a favor by offering
access to that and based upon the fact that access to
whose data, just because it is about the customer, does
not mean it is owned by or belongs to the customer.
Very, very difficult. I don't believe it's an
absolute.

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

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

The question, I guess, is really I think the
controversy has come under the word "fundamental." I
mean, it is a Fair Information Practice principle. The
question is what -- first of all, what does
"fundamental" mean and what does it add to the debate?
I guess if I had to choose between the five
which I thought the fundamental one was, it would be

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

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

So, there's a lot of issues there, and I think that the concern is that it's not really clearly stated as you go through the report, that there may be circumstances when access is not appropriate, that there are -- you know, I think part of the options really need to reflect that there are some
circumstances where access would -- you know, is balanced in such a way that it would be counter-productive or wouldn't be appropriate or would be dangerous to other privacy or other -- the other kinds of interests that were suggested.

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

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

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

Stewart?

MR. BAKER: Well, I really appreciate Ted

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

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

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

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

Let me suggest --

MR. MEDINE: Not much security, right?

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

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

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

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

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

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

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

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

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

MS. MULLIGAN: Yep.

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

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

DR. PONEMON: What an act to follow, my God. About six weeks ago, we talked about an ethics framework, and this is the first time we have actually had a conversation about a fundamental principle, so I am very happy that we're talking about it. It may be a little too late in the process.

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

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

I think that the concern that I have based on real experience is the word "reasonable access." Once you put a wiggle word in front of an important concept like access, you open up a floodgate of problems, and I
think that if we endorse a wiggle word like "reasonable," we are creating some potentially negative consequences to the consumer. So, I'd like us to think about that at the -- over the course of the next few minutes of our break.

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

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

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

MS. MULLIGAN: Can I make a --

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

MS. MULLIGAN: I just have a quick follow-up to Larry, but my quick follow-up to Larry is I share Larry's concern, and I think that perhaps a more finessed way to deal with issues of reasonableness is to say access is the principle, there are reasonable areas where access is limited or comes into conflict with other issues, and to list them and say there are,
you know, trade secret issues, there are areas where the data may actually come at a risk to somebody else's privacy, very clearly enumerate so you don't create a very broad legal realm, but you do say that there are other things that compete here in a much more clear way that don't create that same kind of cloudiness. So, I would like to put that -- because I share the concern of putting kind of a blanket "reasonableness" clause in.

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

Deirdre?

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

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

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

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

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

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

MR. MEDINE: Dan?

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

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

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

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

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okay, which is a common source of fraud.

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

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

Therefore, I also say we should give some pause
to -- thought as to challenging information is good, okay, but necessarily coming in and just saying I'm going to correct it, even if you think it's the -- your own personal information, like your name and address and phone number, don't let people do that too easily, you know, without being able to challenge that. Oh, you want to change the address? Fine, I'll take that under advisement.

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

So, I would suggest that we -- we acknowledge the imperfectness, we talk about the need to be very cautious about this, and we recognize the fact that there's good practices and there's good practices that are a moving target in the process that we'll improve upon, and it won't really be perfect unless we someday could imprint people with nonforgible, you know, IDs, which none of us want, right, stamp us like cattle, and therefore we know exactly who that person is and what they are doing all the time, and I'll know it's you,
but that's -- but that solution is, number one, not perfect in itself, some kind of biometric, and number two, it's not the kind of thing I think we'd like as a solution.

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

I'm not as clear -- you know, I think I agree with you that the -- that the case study, the examples, need to be very -- more clearly noted as examples, but I'm not sure if what I'm hearing from you is that there is no value in examples, and if that's the case -- I mean, I actually think that examples, particularly in the authentication area, are really helpful, and I would prefer to, you know, maybe work with you and maybe Dan and some other people who have a lot of experience in the authentication area to craft some examples that you think would be perhaps less specific but more -- but more useful moving forward rather than
can them altogether, but I'm not sure if you're saying no, you really think we should junk them?

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

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

    MR. MEDINE: Rick?

    MR. LANE: Just a couple things. First, I just want to talk about the fundamental principles and --

    I'm sorry, Rick Lane with U.S. Chamber -- fundamental
principles and access. I think there's a general consensus around the room that access could be a fundamental principle. I think what causes businesses to pause is when you say fundamental principle, in a lot of us, that means, Oh, my gosh, that means fundamental regulation or fundamental legislation. Because it is a fundamental principle, why not regulate it or put it into regulation or why not make it legislation? So, I think there can be an agreement that this is a fundamental principle, but having said that, there are different ways to implement that fundamental principle.

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

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

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

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

MR. MEDINE: Excepting self-regulation.

MR. LANE: But I think best practices --

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

MR. LANE: Again, I think the reasonableness standpoint -- I understand there are loopholes when you say "reasonable," but because as we've heard there are so many challenges even with the examples that we listed, which we thought were pretty good examples, but there are a whole host of other examples.
which could exist. So, you need a little bit of leeway.

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

MR. MEDINE: Dan Jaye?

MR. JAYE: Daniel Jaye, Engage.

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

It seems counter-intuitive to say this, but the first level, the lowest level of access might, in fact, be deletion and not read, and, in fact, if you look at many implementations of clickstream collection on the
web today, you know, one might argue that today delete access is provided. There is an ability for a consumer to opt out of the association of a unique ID with clickstream collection that at that point no longer ties that back to that individual.

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

MS. MULLIGAN: So, can I just --

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

MR. JAYE: It's absolutely a compromise. I just think that when you stack up the relative benefits of allowing a consumer who has concerns about the fact that decisions are being made about them with the potential that a consumer may not get relevant ads and
offers because somebody else has disassociated the
information or deleted it, I think that when you stack
that up, you may -- you come out with the solution that
talks about deletion as the basic level of access.

MR. MEDINE: Okay.

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

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

MR. JAYE: Just to respond, part of the point
I'm making is that it is access, but it's a specific subcategory of access called deletion, you know, of the three major subcategories, access, update and delete.

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

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

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

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

The point I wanted to make was simply that it seems as though there's a continuum of authentication here, sort of that one end of the spectrum is very sort of light authentication, on the other end biometrics, and I just wanted to make the point that I think what's very important is that companies actually monitor and assess the risks sort of along the way, which I guess is what Dan was saying earlier, and then it may not be necessarily that there's a continuum and that it's so
simple to lay out a continuum like that, because ultimately, as a company creates an authentication system, it may actually mix and match and change things along the way and change them relatively quickly if it finds that there's a problem or that there's an issue that's arising time after time.

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

MR. MEDINE: Rob?

MR. GOLDMAN: Rob Goldman, Dash.com.

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

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

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

Dash provides access to clickstream information. We also allow for challenging of clickstream information at a domain level, but we have gone to great lengths to try to provide access to users of that type of information. Derived information is a little thornier, because we have proprietary algorithms
that we're trying to defend. Of course, we want to provide access to the -- to the output of those algorithms, because it's in our best interest to do so, but we have to guard against adverse selection, because the people most likely to use that access will be the ones who will be most damaging for Dash, our competitors. So, we need to do the best we can to trade off against that.

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

So, we have identified that the case studies that may be useful now won't be useful later as things evolve, and just the technology that underlies this is evolving so quickly, some of these principles might shift and change under our feet.
So, I guess I have no -- I wish I had sort of the answer to all of it, but the frustrating thing is that every time I think we get close to something, we realize that there are five or ten principles in conflict just right under our feet, and the answer we've come to for in this case access to nonpersonally identifiable clickstream information just doesn't work when you're talking about health information or other types.

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

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

Dan?

DR. SCHUTZER: Yeah, just to react to the delete, I was sort of thinking about it, you know, when you said you don't have to be as cautious about deleting, because I was reacting to applications I was familiar with, and so, Gee, delete, you know, request for credit or accounts, you know, shudder, right? And then I said, Oh, well, he's talking about click data,
so I guess -- I think what we're talking about here is
so application-specific, and that application, of
course, may change.

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

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

I mean, to ask somebody who's a security
expert, if I'm going to try to devise some new security
algorithm or system and I go and build it and I give it
as much careful thought as I could, I'm an expert in
that area, I still can't be sure, until it's faced the
test of time, that there isn't somebody or some group
of people smarter who have been able to penetrate some
holes in my implementation.

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

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

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

MR. MEDINE: Ted and then Andrew?

MR. WHAM: Ted Wham.

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

As a tangential point to that, and it fits to
other portions of the text within that, deletion per se
causes a little bit of concern for me versus disabling,
because deletion would imply to me it's deleted from
all backup tapes, all offline storage and so forth, and
that is very problematical to implement on a company
basis because of automatic processing and so forth to
back it up. It raises a question which I'd like to
kind of, you know, percolate up to the group here.

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

MR. MEDINE: Andrew?

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

But I think a lot of situations he brought up
are really kind of very minor ones, because they really
don't go to why that company collected that information in the first place. Companies don't collect that information and all this log data to make sure that they aren't getting hacked at. That may be one of the benefits, but that's not really the primary reason why a lot of the companies around this table are collecting all of this clickstream data.

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

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

MR. MEDINE: Stewart?

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

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

MR. MEDINE: Jerry?

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

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Jerry Cerasale.

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

MR. LANE: It's F.

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

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

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

MS. SWIFT: It's page 30.

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

MR. LANE: It's after E.

MS. MULLIGAN: Third physical page.

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

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

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

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

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

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

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

MR. MEDINE: Let me just counsel from the FTC
point of view that you want to be sure how you communicate to consumers what's going on, because if consumers think it's deleted and, in fact, it's simply disassociated or disabled, consumers may be operating under a different impression, and, of course, at the extreme you might risk Section 5 issues, deception, in terms of how you communicate the information to consumers.

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

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

The question I have is from a public policy

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

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

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

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

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

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

In other words, you keep a tape of every week for about a six-week period, and so in the seventh week you erase or you overwrite that last tape, and you roll
it around. In essence, if you delete data in week one
from your live system, by week seven, that is virtually
and physically deleted, but you do have to say it.
That's essentially the process you go by.

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

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

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

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

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

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

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

Rick and Tom, your final comments?

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

I think Richard is right on point, is that it really comes down to notice of how that information is going to be used, how it's going to either be deleted or, you know, the other functions that are out there in terms of disassociating data, because even though you may say I delete and I back up my tapes, if it's already been given to third parties, and you read the privacy statement, and it says third parties have this
information, you may delete it from your system, but
it's not necessarily deleted.

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

MR. MEDINE: Tom?

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

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

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

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

(A brief recess was taken.)

MR. MEDINE: Okay, could we start, please?

Take your seats. I'll be like the House, take your conversations outside the chamber.

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

Jane is volunteering for that.

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

The total access rule is pretty much what it sounds like. It assumes, with very limited exceptions, that any information that is -- that broad categories
of information that are collected about you that
should, in fact, be -- that consumers should be
entitled access to.

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

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

Without going much more into each of those
three approaches, let me just make three additional
points, and then if Steven Cole wants to talk a little
bit more about the default rule, I'll give him an
opportunity.

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

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

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

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

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

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

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

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

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

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

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

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

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

It refers to personally identifiable information that's collected online from an individual or is merged with other information obtained from other sources or from the individual offline. It does not refer to information that is not retrievable by the business in the ordinary course of business. We have some definitions of how you decide that, and the basic
rule is that data should be accessible upon request, proper authentication and all that, unless it would create an unreasonable burden to provide the access.

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

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

There were some comments during the last few days from members of the advisory committee that were very well taken, and I just want to say one or two comments about them. Remember that this approach was borrowed from another purpose, the operation of a seal
program, and remembering what I know you talked about this morning for a while -- I wasn't here for that, but I have been like a broken record raising this point at every meeting -- there is not a crisp focus about what this report is exactly for.

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

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

And the other comment that's an example of the hard look that we ought to give to particular provisions was we have an allowable charge for access.
of $15, and the comment is correctly made, well, maybe $15 isn't the right amount, maybe next Wednesday it won't be the right amount even if it was the right amount today, and there's probably a more general principle at stake here, which is it should be -- I don't know that people would agree with this, but what we saw the $15 is as an amount that might deter some frivolous requests but was not intended to recapture company costs, and we understood it wasn't going to do that, and that's all it was going to serve.

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

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

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

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

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

MR. COLE: David, let me add just one more
thing to that, and again, it gets to the function of
what the recommendation would be for.

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

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

MS. SWIFT: And I would just say that also there is another important point, which is the case-by-case method has a great deal of attractiveness in its ability to take into consideration and weigh a variety of different viewpoints, a variety of different issues, as we have in this commission. That very strength is its greatest weakness, because by weighing all of those, it becomes extremely complex, and that complexity in and of itself might make the 10,000-foot,
sort of the street-level agreement, very difficult to
get, but also, even if you could get there and get a
variety of different constituency groups to agree on
that, knowing what the implementation was, you may come
up with a system that is so complex as to be
unworkable.

MR. MEDINE: Fred?

MR. CATE: Thank you, Fred Cate.

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

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

Then what the rest of this section is looking
at are the types of conditions under which access would be reasonable. Unreasonable access would presumably not be something that we would write about in these sort of warm and glowing terms.

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

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

Under the -- under the default rule approach, the only comment there is just that we seem to be moving in between these two sort of levels of abstraction, that at some levels it's very broad, the 50,000-foot approach, and at some levels it's very specific, like $15, and I find that extremely confusing, and I think it will be even more confusing.
to a reader that hasn't participated in this
discussion.

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

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

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

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

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

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

Jonathan?

DR. JONATHAN SMITH: Jonathan Smith, University

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of Pennsylvania.

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

You can have active efforts by consumers, for example, the use of these pseudonyms, okay, and the, you know, the issue here is -- what we're talking about is kind of passive consumers and active companies, okay, so the companies are doing everything, but there's a different model where, for example, you could have active consumers and active companies, where the companies are trying to frustrate the consumers' ability to use pseudonyms or the companies are saying, Yeah, we can make it work even with pseudonyms, right? I mean, that's part of what we were discussing in one of the points that Dan brought up, and I think that it's kind of important to think about roles here and who's doing what. You know, so, for example,
instead of telling companies what they must do, I mean, one of the things that you could imagine is telling them what they must not do.

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

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

MR. MEDINE: How do you see the active role addressing the criteria that are set out in the report currently, that is, the default, total access, case-by-case? Do you see -- how do you see the active role on the consumer's part setting the standard for
what kinds of information they get access to?

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

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

MR. MEDINE: Staying with our academics, Mary?

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

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

MR. MEDINE: Well, as a former one, I wouldn't
rise to that.

    DR. CULNAN: Mary Culnan from Georgetown.

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

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

    For example, if you apply for a loan online or you make a customer service inquiry and associated with your name comes your credit score or comes your customer profile, like this is a really good customer, you better really be nice to them, is that retrievable in the ordinary course of business or not? And I'm not arguing that, in fact, it has to be given out, but, in fact, I think that would make that data retrievable in the ordinary course of business, because if the consumer came back, it could be -- it would be maybe a
new number associated with that, but it could be
retrieved in the ordinary course of business. So, I
need -- I think we need to sort out those two
dimensions more clearly.

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

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

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

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

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

And then I was just surprised at the authentication discussion following that, that it didn't include any of the issues that would be caused by trying to authenticate prospects, if that's what you
were really going for.

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

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

MR. DAVID HOFFMAN: Who is "you"?

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

MS. SWIFT: If, in fact --

MR. COLE: To whom it pertains.

MS. SWIFT: And I also think the other aspect in that definition is if the business accessed that
information in its ordinary course of business. So,
I'll maybe build on the example.
    I, Jane Swift, sent -- now I'll get -- anyway,
Harry & David's apples to you, and now Harry & David
decides through the online world to use the fact that I
sent you apples to start sending you mail about the
apples that they have on sale this month, so they have
taken the information that I provided, they use it in
their course of business, and it's information about
you. You would have access to that information that
they have collected.

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

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

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

    MR. COLE: Then again, if it's lousy, we don't
get blamed either.

MS. SWIFT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, I just think that the prospect -- to call it prospect information is I think a difficult thing. I don't disagree -- I mean, I -- if somebody sent me a gift certificate to -- to Amazon and I bought some books, I would argue that if I responded, I had a business relationship with Amazon, am not really a prospect, even though it came from someplace else, but I don't think we're arguing about whether or not those people should be excluded from access rights. I think
they probably are at some level of business
relationship with them. How that developed may
be a little unique, and I think we can cover it, but I
think to call it prospect information is -- is --

MR. COLE: Ron, before we --

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

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

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

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

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

MR. PLESSER: Right, that's all.

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

MR. MEDINE: I guess maybe the broader question
is we're talking about a category of information that's reported by a third party about someone else that is in the files or the database of a company.

MR. COLE: And collected online from that person.

MS. SWIFT: And then used.

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

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

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

Tatiana?

MS. GAU: Tatiana Gau.

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

MR. MEDINE: Well, turning that around, then,
would you suggest that notice was appropriate in that situation?

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

MR. MEDINE: Deirdre?

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

David's concern about, you know, whether or not this further complicates access, because I think you were saying there's an authentication problem, right? And I think it's kind of interesting, because Dan Schutzer before was talking about using another channel, right? You have -- Tatiana was just saying, so, I just got the book from Amazon, I now go and say to Amazon, what information do you have on me? So, there's already -- I have the book, and I say, I just got this book from you, da-da-da, my name is Deirdre.
Kathleen Mulligan, and so there's a lot of circular data there.

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

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

Can I add an additional -- I think that the default rule approach is, in fact, the approach that you have in most statutory rules dealing with privacy,
in most business practices dealing with privacy. It's that you have access, and then there are some exceptions, we call them usually, and, you know, the goal is to enunciate where there may be exceptions, and I think Jane's right that whether or not we like or dislike this approach will a lot depend on what those exceptions are.

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

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

The one concern that I have with the default rule as it currently stands is the notion it's very
tied to in many ways an offline model of what identification is. It's tied to name, address, something else that is, in fact, kind of an offline identifier. It kind of explicitly excludes some of the things that we've talked about, unique identifiers that are going to take the place.

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

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

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

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

MR. MEDINE: Andrew?

MR. SHEN: Andrew Shen, EPIC.

I would like to echo some of Deirdre's
comments. I think they are very intelligent ones.

Maybe one advantage of staying at the 50,000-foot level
is that we make these sort of representations, make
them last as long as possible, and there are, of
course, other considerations, of course, it's very
difficult to implement those sort of things, but that's
one thing we have to remind you, keep these
recommendations as technology-neutral as possible, make
these be guidelines that can stand the test of time.

Several points, responding to what Lieutenant
Governor Jane Swift brought up in the beginning.

Enforcement, I think in the security section, there are
enforcement options. We didn't necessarily even
endorse any enforcement selection, but I think maybe that's something as a starting point we can consider for the entire document, so that it can encompass access and security, but that's something we can talk about of course further.

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

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

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

MR. WADLOW: Yeah, the "ordinary course of business" phrase kind of had me concerned, too, and
there seems to be -- I'm just thinking through the
examples that we've been talking about here. Some
things that come to my mind are, for example, I send a
number of books every year to my sister, and Amazon has
her address online, and when I deliver -- when I choose
to send things there, I send them there.

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

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

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

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

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

MR. MEDINE: Ted?

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

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

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

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


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

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

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

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

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

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

    There are countless examples of that from companies that require an e-mail response, and you've got to actually confirm that your e-mail is an actual logged e-mail address because that's a fundamental portion of how the system is run, to other businesses
that require that you provide a true credit card if you
are going to do an online bidding situation, right, so
they can show that you're not -- that you can fulfill
all the ordering and some things of that nature.

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

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

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

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

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

MR. WHAM: I'm not referring to third party, I'm referring to -- to Jane Swift. Okay, so, the example --
MS. SWIFT: I would be the third party.

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

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

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

MS. SWIFT: Right.

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

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

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

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

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

I have all the building blocks to say where did David Ellington go? I do not use that information
today, and I do not go through and I don't have the
processes to go through and say I want a profile of all
the different page views that Mr. Ellington does.
Dash.com does, but I don't have that model right now.
Could I create it? Yes.

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

MS. SWIFT: But -- I think you're expressing
your opinion, but I think the most important thing is
to try to get people to a comfort level of each one,
and as I said before, if you want to go to -- but I
think it's sort of useless, because whether -- unless
you have a need to know who supports which approach, I
think what we're trying to do is define the broad
spectrum of approaches, try to determine what would be
the model of those approaches, and we could sit here
and take a vote, but I think depending on a variety of
different circumstances, like who enforces it and what
the details become, people are going to vote in
different ways, and I can promise you we will never
come to consensus on one approach.

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

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

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

MS. MULLIGAN: Can I respond since I --

MR. MEDINE: Sure.

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

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

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

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

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

MR. MEDINE:  Congratulations.

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

MS. MULLIGAN:  -- and I do want all that
information, or if law enforcement comes in because
they want access, I mean, there is a privacy risk here.
Now, do I want to create a system that makes that
retrievability easier and encourages more malicious
behavior, more inquisitive behavior? No, I want you to
design systems that limit the risk. But for me, the
corollary -- the corollary piece of this is that
self-regulation might be able to do a lot of things.
It can't address the two scenarios that I just put on
the table.

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

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

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

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

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

MR. WHAM: No, I mean, do we want to suggest
that having total access, that we would suggest that
having -- that creating means of access when they
otherwise would not be created by the businesses is
something that is a legitimate policy option that we
would -- at least one of the members of the committee
would want to endorse?

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

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

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

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

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

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

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

MS. MULLIGAN: We are sending you downstairs.

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

MS. SWIFT: Can I just say in the pros and
cons, opponents would argue that -- opponents would
argue, I think we might have lost a piece in the
transition. Under opponents would argue on page 9 of
the total access approach, the next to last bullet
says, "Providing access to derived data would affect
the confidentiality of," and I think that was supposed
to say "consumers" if I'm not mistaken, which is
exactly what opponents are saying. So, we did try to
build in those types of considerations, recognizing not
everybody agrees that that has to happen.

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

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

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

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

One is to avoid names -- section names that
imply some kind of value, and I think, for example, the
default name implies something more than it was
tended to mean. It might be a lot more neutral just
to say option one, option two and option three.

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

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

Third of all, I think we're really trying to
oversimplify this. Both the default -- so-called
default approach and the total access approach are
trying to grossly oversimplify a terribly complex
issue, and I think that, in fact, when you dig into it
and you look at all the qualifications that are
embodied in the so-called default case and then try and
put parameters on them so you could actually implement
it, you end up with a case-by-case approach, which is where
I started, and most of my parameters somehow ended up
being deleted out of the final text, and I'm going to
hope to get them back in by working with the final
drafters, by putting them in as a case study, because
they were originally in as an example.

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

MS. MULLIGAN: Can I just say, if we deleted
it, we had no intention to delete anything. It was --
every piece of text that was in in anybody's document
was supposed to be here, and so if we did, I hugely
apologize.
MR. ALLEN: I am not complaining. In fact, the more I look through the document, the more I find pieces that I thought got deleted. So, most of them are probably there, just not in the form that I expected to see them.

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

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

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

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

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

    MR. MEDINE: Stewart?

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

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

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

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

MR. MEDINE: Good, thank you.

Lorrie?

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

MR. MEDINE: Could you use the microphone?

DR. CRANOR: Sorry.

There was a statement made that information
about third parties, you could not authenticate, and I
just want to point out that if somebody orders a book for me, when that book arrives, it could come with a statement that includes a password or some sort of a code which I could use if I wanted to go back to the company and find out what they have on me. So, that's sort of a red herring.

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

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

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

DR. CULNAN: Or it could be even collected
online was -- yes or no, so it could be -- if not
collected online but it's retrievable in the ordinary
course of business by PII.

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

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

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

MS. MULLIGAN: Yes.

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

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

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

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

Jim -- Ted?

MR. WHAM: I'm sorry, I --
MR. MEDINE: Muzzle. I think we have got to keep on going.

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

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

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

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

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

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what that is.

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

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

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

MR. MEDINE: Dan?

DR. SCHUTZER: The difficulty I had with this
section is that it was okay in the beginning where we
tried to elaborate different situations, but as we
begin to discuss these options, and I hear people who
talk around it, well, you know, it starts to turn out
that we start putting adjectives and exceptions to all
of them, right? So, we talk about full, but then we
talk about there are some exceptions about derived and
there are some exceptions about -- and the same with
the default and the case-by-case. What do we mean by
case-by-case? And we end up with an example that sounds
remarkably like the default.
So, I say to myself, are these really options, really? I don't know, because by the time you put all the right caveats and conclusions, they might all three be closer to each other, and there might really only be one option. I don't really know that, because no one's really made the effort to really seriously take these three pure things and talk about things that would be reasonable to apply. So, I don't think we've worked hard enough at this particular case to really drill down.

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

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

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different information from different sources that have
different indices and different kinds of addresses,
different kinds of IP, e-mail, et cetera, so I can get
a complete picture of what everyone has on me, but it
would be extremely difficult for any company or even
sometimes subsidiaries of the same company to get that
same clear picture, and I suspect that most customers,
most consumers are probably like that, like -- more
like me, in the case that many times their motivation
in spreading their business around is twofold.
Sometimes spreading it around will find the best deal,
but sometimes spreading it around just so their
information is different and distinct and not so well
integrated. So, those are two points I have to make.

MR. MEDINE: Ron?

MR. PLESSER: I think it follows the track,
concentrating on really the default option, there's a
couple of concerns in there, and also on this viewing
concept. The proponents of the approach would argue
that consumers be able to view passively, and also in
the last sentence, I guess on page 5, "This system
would be consistent with the storage and use practices
of the business." I think we're very concerned or many
people are concerned that, you know, if access is
provided, that it should be provided and could be done
in a return e-mail, maybe even in mail, but the
question of kind of an online, realtime access, and
this last sentence, I think, at least raises that
spectre, that, you know, you have to do it consistent
with the practices of the company.

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

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

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

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

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

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

MR. COLE: It's not in the default.
MR. PLESSER: It's in the default.
MR. COLE: It's not supplied by the individual online. It's in the total access.
Jane? I'm sorry.

MS. SWIFT: That's okay.

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

MR. COLE: Yes.

DR. CULNAN: That was our point, too.

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

MR. MEDINE: Rick?

MR. LANE: Yes, a point of clarification. When you were talking about having access to information, when something is sent to me from someone, is what I understood, so you mentioned that you could have a pass code so you could have access to that. What information am I accessing, just the information of that book or that product that was sent to me, or all the information that that site has on me from a variety -- you know, from transactions that I have done on the other side?
Because if it's all transactions or even other transactions of people that sent it to me, the problem is if I get a book from Amazon that has a pass code on it, what happens if, you know, several -- you know, I throw out the box and I don't realize there's a pass code and someone takes it out of the trash, or I'm out of town for vacation during the summer and someone goes to Amazon, sends me a $5 book, and then I'm able to access all of the information on that individual, including their credit card numbers, because I have a passcode?

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

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

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

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

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

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

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

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

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

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

DR. CRANOR: But if I've never purchased
anything from Amazon, so now they are creating a record
on me for the first time, I should have some way to
access it. If I'm already a customer, I already have it.

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

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

Dan Jaye?

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

There is also the use of the term "globally unique ID," that's another term we need to define, and
we've taken a stab at that in the past, but particularly the sensitivity there is IDs that have a high risk of being associated with data that can then be used to locate and contact an individual.

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

Well, sometimes you can provide it because they're in the sample, and sometimes you can't, and just the ongoing concern consumers might have about,
you know, are they just refusing me access or did they really not have it?

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

MS. MULLIGAN: Can I respond to that?

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

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

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

MR. COLE: And nor are we seeking to.

MR. MEDINE: Okay, I --

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

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

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

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

DR. LANCE HOFFMAN: Offline.

MR. MEDINE: Offline, okay.

Josh?

MR. ISAY: Josh Isay.

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

MR. MEDINE: Okay.

Lance?

DR. LANCE HOFFMAN: Lance Hoffman.

You'll be happy to know this is not going to be
substantive but more on process, and it will be brief.

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

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

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

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

Do I have this right so far?

MR. MEDINE: You do.

MS. GAU: With an e-mail vote.

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

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

I would also follow up on an earlier suggestion
that if groups want to maybe nominate two people from
each group to be part of some drafting process so that
each of the groups has representation, you might
confer among yourselves and nominate two of your
members to join with the drafting group so that you
make sure that your views are represented in the
revisions to this effort. I think that would be
helpful to have a broader representation as we move
forward, but I think why don't we come back and try to
look at our calendars and figure out how we can
accomplish all of these tasks.

DR. LANCE HOFFMAN: Is that a fixed deadline?
MR. MEDINE: Yes.

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

(Whereupon, there was a change in court
reporters.)
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
data. Facts that are corrected are facts. We can make the inferences that are basically just aggregations, summations, counting, various mathematical operations on facts, and those remain facts.

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

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

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

MR. MEDINE: Thank you. Deirdre?

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

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

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

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

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

MS. MULLIGAN: The notion of non personally identifiable is a very slippery term. I mean, I can talk about, for example, if I say we have information that has been compiled about your use of a service but I
don't have your name attached to it but in fact you're
the only person that has gone to those six web sites and
we're using all this data to make decisions about you
where quote, unquote, when you come to the web site,
we're changing the experience -- we're contacting you
with different ads, if you want to use the word
contact.

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

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

And I don't want to suggest that the name is the
magic thing that makes that data important. It's being
used to make substantive decisions perhaps. Dan

1 certainly thinks there's some reasonable things one
could do, and I don't want to create this bright line
that says only if it has a name, address or email
address.

MR. SCHUTZER: I would support that notion.

MR. MEDINE: Let me just respond to that.

Dan?

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

MS. MULLIGAN: Yes.

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

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

That is not considered at least in my intent of
using that definition, just so that my definition isn't
used in a different way, to be counted as a contact.
Contact would be I can send a message to you because you
have a fixed IP address. I can send a message
to you because you have some sort of contact mechanism
like an anonymous email address.

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

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

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

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

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

MS. MULLIGAN: I think you're right. There may
be differences on how intrusive is it on my privacy, but
it doesn't change the calculus of you're using the data,
you're using the data to change my experience, to change
what I get. The data is associated with me in some way,
shape or form.
MR. JAYE: Absolutely. It affects the experience of the computer visiting the site. I wanted to clarify the definition of contact that I was giving.

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

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

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

MR. MEDINE: David.

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

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

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

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

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

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

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

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

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

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

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

    MR. MEDINE: Ron?

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

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dynamic.

(Chorus of nos.)

MR. SCHUTZER: Incorrect.

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

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

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

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

MR. PLESSER: We're talking different language.

MS. MULLIGAN: It depends. It varies highly.

MR. MEDINE: Okay.

(Discussion off the record.)

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

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

MS. MULLIGAN: I think the presumption in the default one is if something is retrievable, right, in the normal course of business and then there's this question about whether or not it's personal, and my
argument I guess is that information that's being used
to make decisions about people is archived in a way that
it is identified as a specific -- it may be a computer,
the same way it may be my phone, but we all know that my
phone number and me are fairly tied, my IP address and
me are fairly tied, a unique identifier that's assigned
to me could be tied, that there may be reasons why we
say no because there may actually be information about
six people and therefore we're going to mitigate on the
access, but that we don't create an assumption that that
data is never accessible which is what this does right
now.

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

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

Secondly, in our access two subcommittee earlier,
we had done a whole list and attempted to do a list that
then got taken out just of definitions, and I'm thinking
that one of the things that might help us to get to the end of this process is a lot of the discussion we're having is on using consistently the same words for the same definition and agreeing on definitions.

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

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

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

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

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

MR. MEDINE: Thanks. I would like to again because of the clock to move to the entities discussion, and perhaps someone from the entities group could help -- also one quick style suggestion is try to transform some of these questions into options just to
be consistent with the other sections of the report.
I know we're all trying to blend it into a cohesive document, but that might be a useful way to just make it appear similar to the other discussions, but there seem to be three entities that are discussed in terms of -- and it might be useful perhaps if maybe someone in the group might be able to walk us through what their thoughts were on those divisions or what the consequences would be.

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

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

MR. CERASALE: David, mine's been up for quite a
while, even before lunch.

MR. MEDINE: Sorry.

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

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

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

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

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

MR. CERASALE: Yes, I am. He has a statement in here that is quoted. It's not something we put together, it's something that's quoted. He's saying...
that date of birth by itself is personally identifiable

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

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

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

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

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a consensus that it's a fundamental right.

The paragraph right before that, the last sentence, discusses raising additional authentication problems for data that is not -- that have a unique identifier or a browser identification and so forth. I would like to add in there, it's not just raising additional authentication concerns but also additional privacy concerns to allow access there.

Now I would like to, if we can, turn to page 8 which is the first section on B, total access approach.

I want to ask a question. In the second -- let me find it here, in the second paragraph where we talk about consumer costs, it's the paragraph that goes "this approach," if you go down one, two, three, four, five lines, consumers would also experience additional costs such as pass through costs for system upgrades, new personnel, et cetera and so forth.

I would like, if we can, to add something in there that says they're going to face higher prices for goods and services for all consumers to provide access for those consumers who request it or something along that line. I think this report needs to show that the access costs are going to go on all consumers, not just those consumers who want it.

And I think one final statement, the general
statement I've said many times before, on uses of data
versus access. I think there's a huge difference in the
use of data and what we should do in access and how you
should do it with any cost benefit equation for data
that's used to determine the eligibility for a product
or service, whether or not you're eligible to receive it
versus data that's used to determine whether or not a
business is going to expend its resources to offer a
good or service directly to you.

I think it's a huge difference, and it's in the
approach here. It's in a couple things, but I wanted to
really emphasize that because it's a major difference.
Deirdre, you talk about you're making choices, and that
puts all of it together. The choice of whether or not
to send you an ad is very different of whether or not
you can buy this product.

MR. SCHUTZER: What if the ad had discounts?
MR. CERASALE: Pardon?
MR. SCHUTZER: What if the ad came with
discounts or some kind of a feed-in teaser, I don't get
it and you get it.

MR. WHAM: You do that all the time, all day
long you're --

MR. SCHUTZER: Does it have the relationship of
eligibility in a sense?
MR. WHAM: All I'm suggesting is that there is not a business representative at this table that does not use price discrimination.

MR. SCHUTZER: Of course.

MR. WHAM: Price discrimination is economically efficient.

MS. MULLIGAN: The only question is whether or not --

MR. MEDINE: The question is should you have access to information that leads to the decision to choose different prices.

MR. WHAM: The answer is you look at what the analog is in the non online business where there is absolutely no requirement for that in any sector that I'm aware of in American business. Where is it that I am told as a customer of Nordstrom that I'm supposed to get the same offer that you are, David, or that I have any right to know what the offer is?

MS. MULLIGAN: If all we were going to do is to figure out what had happened in the offline world and how to apply it, we can go home. I can tell you there are very few access rights. There are some laws that require it, and very few businesses provide it other than what's legally required.

I don't view that as my task, to import the

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offline environment into the online. If anything, I would hope that the rules that are developed here in what I view is a very forward looking segment of the business community would help inform what the rest of the business community does.

MR. WHAM: A lot of what that has in practice is that that means that you take an emerging not clearly economically viable in all of its business models and you overlay a higher standard of performance than you do for a non online business model.

You take CD Now with a stock trading at about $2 because they can't figure out how to make a buck and you look at it and you say, You now have to tell all your customers why you get a 10 percent off deal and somebody else gets a 20 percent off deal, and let me tell you, the customer that gets the 10 percent off is going to want the 20 percent off.

And you're going to remove in practice that company's ability to offer a differentiated price out there, and that does not serve the interest of the business certainly. I don't believe that in the end it will serve the interest of the consumer because you're going to end up with least common denominator offerings, and it doesn't serve the interest of the economy as a whole. It's a bad thing to do.

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MR. MEDINE: Let me call on Josh and then Jonathan, and let me just say to those who are in the entities group, we're eating into your time so if you want to have your say in the open session, you're going to have to weigh in on entities issues.

MR. ISAY: It's the fundamental flaw of the default rule which is that the scope of access does not take into account the type of information that's collected and the possible harm that it may cause. Do people here think that the access should be the same for consumer credit information as it should be for the number of white socks that someone bought?

MS. MULLIGAN: I think the question was best posed by Steve Cole. The question is, do you start with a presumption of access and then a business has a responsibility to say, no, there were reasons that mitigate against access, or do you start where I think Josh, you would like to start, which is the presumption, consumer, unless you can prove harm, you don't get access.

And I think my overall agreement is that I would like to start where Steve has put it, not in the I have to prove harm in order to get access because that's not a robust access principle.

MR. ISAY: Yeah, but the bottom line is we do
have in the offline world different levels of access for
different types of information. It is a commonly
accepted sliding scale that we have in the offline
world. Are we saying that that sliding scale should not
be applied to the online world that it is in the offline
world? It doesn't seem to make much --

    MS. MULLIGAN: I don't think we're trying
to undo medical rules, financial rules, credit rules
at all. I think we're looking at an area where right
now there are very few rules and saying we've
identified this, FTC's identified this, BBBOnline,
TRUSTe.

    MR. ISAY: But should consumer's right to access
for their health records be the same as -- should their
health records --

    MS. MULLIGAN: Their health records aren't on
the table right now.

    MR. ISAY: -- be the same as they are for the number
of white socks that you have bought from a store?

    MS. MULLIGAN: I think --

    MR. TORRES: If you're collecting information
about how many white socks I buy, what's the harm in
telling me you're collecting that information?

    MR. ISAY: It goes to cost --

    MR. TORRES: Do I need to see that, I mean --

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MR. ISAY: It goes to the cost benefit to business and consumers. That's what --

MR. TORRES: Nobody's twisting businesses' arm in forcing you to collect this information in the first place, to the extent that you package it up and sell it or share it with other entities with or without my knowledge or consent, and then to turn around and say, Well, gee, we don't know if we can provide this to you because the cost is too much for us, to do that or to even tell you about it just doesn't get us anywhere.

I mean, I agree that we need to be reasonable about how we approach this, but to throw in a red herring about, Oh, this is going to be at undue cost we can't share it with you but we can share it with everybody else in the world or we're concerned about your privacy and I'm glad to see so many people sitting around the table all of a sudden concerned with customers' privacy, to say that we can't provide you access because of privacy concerns, tell that to consumers out in California and in Minnesota who had their privacy violated by financial institutions instead of protecting that same information.

Like I said, I want to be reasonable about things, and I agree that cost is a concern, but at the same time don't use that as an excuse not to provide

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access to accounts with consumers.

MR. COLE: Can I ask a procedural question to maybe help you get to what you want to get to? This is really interesting, and I made a list of things I would respond to if it was appropriate to do that now, and if you tell me it is, I will, but does it matter? Does it matter?

Haven't we all agreed that various options and differences of opinion will be in this report. David knows I've had some misgivings about that, but that's what we've all agreed we're doing, so we know now there are different -- we've known it for hours that there are difference points of view here, so let's get all those points of view in the report and move on.

MR. MEDINE: And I think in part as we go on I think there are some new points that have emerged in response to the draft that will make the report a full reflection of a variety of views.

MR. COLE: Oh, absolutely.

MR. MEDINE: And I think that is really the most helpful. These are obviously issues as today suggests that we can continue to debate for an extended period of time and discuss, but obviously we have a very focusing event coming up which is completion of this report.

And I think it has been -- I think it's been

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valuable in terms of going through these various
sections to have new issues emerge that people felt
should be in the report that weren't in the report, and
that was really the goal here is to have a smaller group
prepare a report and have the larger group comment and
say their views ought to be reflected and are not
currently or the report got it right or whatever.

And so I think we're proceeding, but
unfortunately we also have a time constraint, and right
now again I want to reiterate we're eating into the
entities group time, which is fine, but we do need to
reserve some time for security, obviously a very
significant component of that, so I think it was a
helpful discussion.

And now I'll call on Jonathan and again we'll
see if we want to skip entities and move into security
because people feel that that adequately states their
concern, that's fine, we can do that, but I want to
reserve a sufficient amount of time for the security
discussion.

Jonathan?

MR. JONATHAN SMITH: I would just like to note, as
numbers and not words person, I did a quick calculation
that I think illustrates the difference between online
and offline for Ted, and here's what I calculated,
okay? If I remember correctly from the news report, the
CD Now incident was 300,000 credit card numbers.

MR. WHAM: Wrong company. Wrong company. My
example was not CD Now. I was just suggesting that CD
Now uses price discrimination, which they may or may not
do.

MR. JONATHAN SMITH: Okay. Well, somebody
someone lost 300,000 credit card numbers. At 60 lines
per page that's 5,000 pages. Controlling that
information generally would cause a hernia for most
people, okay, and so I think the differences, the point
that I made in the last meeting which is Moore's law
which is the cost and ease of moving that information in
the online world is very, very different, and I think
that's the source of concern.

MR. MEDINE: I'm going to give entities one more
chance. Then it's going to be going, going gone on
entities. Dave?

MR. DAVID HOFFMAN: I was going to give a brief
download of our entities work, I think very brief
because I actually don't think -- I think there's a lot
of disagreement but I don't think where we ended up
there was much disagreement on the range of options that
we ended with, and there was a lot of commentary in the
end of our draft.

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So I would just want to provide a brief summary, especially of the three different options we ended up with on entities, and if I could figure out which pages of which drafts everybody is looking at, I would give you a page, but at least on mine it's 7.

MR. SCHUTZER: It's 17.

MR. DAVID HOFFMAN: I would also say then since we did have a high amount of disagreement on our committee, there may be others on our committee who will want to come in and give some comments after I talk.

The three different options, and these need to be cleaned up, but the first one really goes to just the fact that the entity collecting the information from the individual would have to give access, and it would only be those entities that actively maintain the data that is linked and associated with individual consumers or consumer households. That was one option. At least we thought these were in sort of a spectrum.

The second option was instead of talking about just the entity that's collecting the data, it was the entity the consumer reasonably believes is the data collector, and the differentiating factor we thought there was we will have a number of situations where it may be actually another company that's actually doing the physical collecting, but the consumer actually
believes that it's the branded entity that they're discussing.

So they may actually contact that branded entity. They may not have really collected it, but they should be able to get access from the people that they think they're giving it to.

MR. MEDINE: Can you give a real world example of that, not necessarily identifying a company name, but a context in which that may arise?

MR. DAVID HOFFMAN: I'm more than willing to avoid giving names, which I think we all should do start doing, although we only have a few hours left to comply with that.

A data hosting situation potentially where a data hosting company may be actually managing the application, the web site that collects the names, but they're actually -- they're actually not the ones that are branding it, is that they're actually branding it as another entity that's hired them to do that.

MR. MEDINE: So a consumer would reasonably think it was the other entity that was collecting the information and not the hosting company.

MR. DAVID HOFFMAN: Right, so they wouldn't call the hosting company if they wanted to get access. They would call the company.
The other situation that we wanted to call out there would be to separate from -- in large corporations you could easily have as far as the definition of the entity just a subset of the entity. It could be an individual brand, if it's a brand management type company, or it could be an individual service within that large corporation.

They would contact that individual part of the corporation, not believe that they could call anywhere within that corporation and expect to get access, so those were the two points I believe we were trying to go for there.

We then said -- and this goes to the data hosting situation that you should be -- if that entity is using an agent, and we talked about this the last time we got together, the difference between an agent and a third party, that that agent then should be required to give access as long as that agent, and the definition of agent being the restriction on the use or further transfer of the data, so there's a variety of different agencies you can think of, including some of the shipping companies of potentially doing fulfillment of goods.

And then we -- the second option assumed that what you could take care of, and this was hotly debated

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in our group, that other third parties and this whole
idea we talked about during the last meeting of the
chain of trust, that you could contact one company.
They would have to contact everybody they had sent the
information to, who then would have to contact everybody
they had sent the information to to give access back.

The idea here being that -- several members of
our committee thought that that was unworkable, although
several also thought that that should work, so we built
in an option saying, Hey, in that situation just
notice. You put on the online service that the
information is going to be transmitted to
third-parties. If people don't want that to happen,
they choose not to take part in the service.

The third option was the inclusive option
basically saying the entity that collects it, parents,
subsidiaries and other recipients which would include
third parties and agents. That's my --

MR. MEDINE: What was the group's thinking about or
perception of information intermediaries? What types of
entities would that cover?

MR. DAVID HOFFMAN: Could be an agent or a
third-party depending upon the contractual relationship
between the information intermediary.

MR. MEDINE: And the data collector? There is
also presumably information in the intermediary on behalf of consumers.

MR. DAVID HOFFMAN: Can you give me an example of that.

MR. MEDINE: Well, some of the anonymizer type services, for instance, where I'm acting on behalf of the consumer to interact. Would that --

MR. DAVID HOFFMAN: I would assume -- I'm probably not understanding the question. I would assume an anonymizer in that situation --

MR. MEDINE: Would have access obligations?

MR. DAVID HOFFMAN: Yes, would have access obligations.

MR. MEDINE: And likewise, another situation that you're concerned about information the intermediary would have and the data collector would also have access requirements under the third option?

MR. DAVID HOFFMAN: Yes, if they're acting -- I'm assuming by information intermediary you mean someone generally that the consumer or the data subject would not have knowledge would actually be getting -- would actually have the data and so, yeah, I would.

MR. MEDINE: Greg, you wanted to weigh in?

MR. DAVID HOFFMAN: Can I just say I wanted to give an opportunity for Andrew or some of the other
members of our committee who may have -- or Frank or
anybody or Ron who may think I didn't describe that well
before.

MR. SHEN: No, I think you did a great job of
describing that.

Actually to get back to your question, David, I
think you're referring to infomediaries, and maybe we
didn't really do a good job of distinguishing this, but
I think when we use the term information intermediary,
we're talking about the sort of web hostings, sort of
out-sourcing that David Hoffman was talking about.

And I think those kinds of situations you're
talking about as some sort of third party that I have as
a customer or an independent user, an active
relationship with those. They hold my data and allow
people to see it.

MR. MEDINE: Well, I may be evidence of consumer
confusion about that point. It might be useful to at
least clarify that.

MR. DAVID HOFFMAN: That would fall under what
we referred to as a data collector because they would be
actually collecting the data from the end user, the
subject.

MR. MEDINE: Do others on the group want to
comment? Ron?
MR. PLESSER: Well, just everything that Dave said was great except the additional point that's in there is that we did talk about, at least in terms of access, the correction. On the correction stuff there may be certain entities where it's not appropriate to have them do corrections such as public record disseminators, and that was not a consensus but it was an option in there and I just wanted to highlight that.

MR. MEDINE: Greg?

MR. MILLER: I had a couple comments. One was to mention that the infomediary is typically referred to as broker in the Internet space for clarification.

But the other two things were administrative points, one tangentially related to entities, and I'll take that one first. I would like to propose for the record that maybe in our introduction that we note that we respect the reality that there is legislative and regulatory efforts going on underway in various stages of completion with regard to protection specifically of health care information and financial information and that we recognize that there's probably going to be some question about conflict and resolution between different regulatory agents trying to do the same thing but with different conditions and criteria. Health care information in particular has some pretty specific
The other question I had administration wise is, are we allocating any time in the remaining couple hours here to talk about production and scheduling challenges or shall I say opportunities?

MR. MEDINE: I hope so at the end. I think we'll have to reserve a fair amount of time for that.

MR. MILLER: I too have been doing some calculation here, and just based on the content, the quantity of content we have today and having been around sort of production schedules before, we've got some serious issues to resolve with what we're trying to accomplish, so...

MR. MEDINE: Well, as long as we can move through the other matters, we'll take that up as the last matter but as soon as possible because I think that does raise some significant practical issues.

Other comments? Stewart, you have your flag up on entities?

MR. BAKER: In the interest of time I withdraw my comments.

MR. MEDINE: Other comments on entities, David? Richard?

MR. PURCELL: I would just like to ask if there's -- what the subcommittee was -- what were you...
thinking? What was the discussion around or was there a
discussion around entities reporting about other
entities?

There is a discussion around whether or not
entities would forward corrections to other entities
that are downstream in a distribution chain which is
addressed in here, but what I'm questioning is whether
entities should have a role in reporting to which other
entities they did distribute data?

As an example, I'm on a web site. They say, Can
we share your information with third parties. I say,
Okay. Do I have access to the list of third parties to
whom my data was distributed?

MR. DAVID HOFFMAN: Under option 2 that you
would be given notice to who those third parties would
be.

MR. WHAM: Specific firms, specific instances?

MR. PURCELL: Right, what I understand your
response to be, David, is that in general here is the
list of companies to whom we distribute data, but we're
not at all sure to whom among this list your data was
distributed. I'm just trying to clarify .

Let's say I have a serious change I have to make
to my data, and I'm not able to have the data collector
forward that change down the distribution chain. Am I
to be provided a list of companies to whom that
erroneous data was distributed so I can individually
contact them for the change?

MR. DAVID HOFFMAN: I don't think I'm the right
person to answer that because I was the person
advocating the option that I think that would take care
of that so that wouldn't happen because I think that's
the sole reason why I think -- I think that's so
unworkable.

I think notice is the only way to go, and you
educate consumers that it's the information -- if
they're going to participate with an online service and
give them information, that information is going to be
disclosed to third parties, that they're not going to be
able to propagate corrections or get access to that
information then.

MR. MEDINE: Does anyone else want to take up
that question? Also I just would add in the context of
some of the financial and medical regulatory issues
there has been at least a view that you don't disclose
the specific firms to whom the information is disclosed
but the types of firms. That would then make it very
difficult to effectuate what you're aiming at.

Deirdre?

MS. MULLIGAN: Except in the medical context. I
mean, it may not be in the privacy rules, but as a
physician if you propagated an error, there would be
some duty for you to correct it if it was something that
was going to impact people in a substantial way and
I think that's part of what Richard was getting to.

If there is data that is potentially -- it's
incorrect and the fact that it's incorrect could lead to
some serious ramifications, is there a requirement, and
I think this may best fall under what Jerry would call a
case by case.

You have to look at this, and if you are in the
business of transferring data that's going to be used
for health care, for example, you better have an audit
trail of where you're sending that data because people
are going to rely on it, and then if they rely on it
inappropriately, you know.

MR. DAVID HOFFMAN: One comment on that because
the discussion that we had didn't really come out very
clearly was that we had concern that even if we gave the
ability for consumers to go follow the data, they would
never catch up to the data. They would never find all
of the places to go to the data, so we thought what's
the best way to handle that?

The best way to handle that is to educate the
consumers not to have given that data in the first place
or have the company control that data by actually --
those parties being the agents and contractually
committing those parties not to further transfer the
data, and then that data collector would have the
obligation of going and propagating that correction.

MR. SCHUTZER: Let me talk a little bit about
it. I think we discussed that at great length. Now,
what happens sometimes, I absolutely think you should be
telling people who you gave the data to. They in turn
may be giving it to if other people. They may in turn
not store the data in the same format I gave it to them
in.

For example, if I buy a list from somebody, I
may scrub that list by comparing what other data that I
have and correcting things or making inferences based
upon it, so it could very well be that although you
found an error in the original data, I don't have that
error because I corrected it, could be.

So rather, we thought that in some cases there
were responsible sources, right, that everybody tapped
and that were responsible for maintaining things. Like
for example in a financial case you might talk about a
credit bureau. Certainly you would want to go back to
that source and correct that.

Now, whether you would be able to practically
propagate would be on a case by case basis, but clearly
I think we all agree that to the extent that you can and
you have that information available, I should be able to
say that, yeah, not only do I share the data with these
entities but these are the entities I provided your data
to the extent that I have.

Now, I might indeed not know who they shared it
with. I might not be at all knowledgeable about whether
they're storing it or not, so it's their
responsibility. Also if they are maintaining data
online, they should provide you access to it, and you
indeed were going to go and access it and see if they've
got it and see if it's a correct thing or if it's
erroneous.

MR. MEDINE: Frank?

MR. TORRES: I think this is one where it is
certainly reasonable and this task comes in to play, did
I buy six white socks instead of four? Ultimately after
I realize that you're collecting that type of
information, does it make any difference if I can
correct it if it's wrong?

MR. WHAM: What about five?

MR. TORRES: Then it doesn't become
unreasonable, but I think we all have the benefit here
of David's other life, and that is one of the leading
Fair Credit Reporting Act experts here in Washington, and I think that maybe that could provide some guidance as to what the obligations are of entities that report, merchants that report credit information to bureaus and their obligations to go about correcting it and providing access to that information because that's one area where your credit report is used to make decisions that affect your pocketbook, consumer's pocketbook, how much you pay.

And I venture to guess if anyone around the room is buying a house or applying for a credit card, you would want the best rate that you could get, and to get that, you need to make sure that your credit report accurately reflects where you are and if there's any errors in it to be able to get in, see it. If there's errors you would be able to correct it. David and I --

MR. MEDINE: Briefly, furnishers of information under the Fair Credit Reporting Act have a duty to correct information and likewise credit bureaus that discover error are obligated to share that information with other credit bureaus.

I'll leave it to the group as to whether that's a model that's relevant to your discussions or not, but in that world there is the both sharing and correcting duty under the Fair Credit Reporting Act.

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MR. WHAM: But there's not a responsibility to send that to the people you previously sent the credit report to, is there?

MR. MEDINE: Well, the consumer can request a credit bureau send an updated corrected report six months back, everyone who received it for credit purposes, and two years back for everyone who received it for employment purposes as a matter of law, also once it's been corrected and updated.

MR. TORRES: To bring up a point that Stewart raised at the beginning of this today, this session today where maybe we need to look at cases where the consumer has some benefit, and maybe the higher level of correction falls in those circumstances and a less level of correction falls in other information that might be out there.

MR. MEDINE: Dan?

MR. GEER: This is very late in the game to ask this question, but let me make sure I understand it. When we talk about information relating to a person, everything here has been in the context of flesh and blood and not a legal person. Am I wrong or am I right?

MR. MEDINE: I think we're talking about human being consumers.
MR. GEER: Only flesh and blood, but not the legal person, so if, for example, just to make it up, I have another life where I'm incorporated as a whatever, you could not tell the difference between my use of such and such a book store as to whether I was operating as my legal person or as my physical person.

I don't know how you're going to get that, get at that, but it just occurred to my all of a sudden, what is the definition of a person. It's a little bit of a problem.

MR. MEDINE: I think we've been operating under the flesh and blood person. Obviously sometimes those protections may carry over to non flesh and blood corporate entities, but our clear focus is on people.

MR. GEER: Well, the small business entities where you're operating out of your house, and there's lots more now, and the net makes that so, I'm wondering whether we missed something here. This is a non sequitur I admit, but when we're talking about entities here, does the entity thing include legal persons?

MR. MEDINE: At least corporations don't buy five pairs of socks so we may be safe there. Other comments about the entities issue?

MR. CERASALE: I just had one question to make sure I understand it. Where in this do the deliverers
of products, the UPS, the Fed Ex, the Postal Service
stand in connection -- one second.

I think he mentioned deliverers. Where do they
stand in these entities here, UPS, Fed Ex, Postal
Service?

MR. DAVID HOFFMAN: Generally I believe they
would be agents because they would -- part of this would
be to drive the obligation on the data collector in
their contracts with those companies to make sure that
the data is protected by saying that they cannot forward
that data on to anybody else or use it for any other
purposes.

MR. MEDINE: Who would be providing access, the
agent, the shipping company, or the data collector?

MR. DAVID HOFFMAN: I'm sorry?

MR. MEDINE: Is that what you were --

MR. CERASALE: Yes, I would like to know. In
other words, is it an obligation suddenly of Fed Ex or
more problematic of the United States Postal Service to
provide access?

MR. DAVID HOFFMAN: No, I think that the
obligation is on the data collector to make sure that
access is provided. Now, the data collector may choose
--

MR. SCHUTZER: Wait a minute. If I'm a
transporter like a UPS and I choose to maintain a
database of this information, then I think they should
provide access to it. If I'm just maintaining that
information to do a service, I don't keep it.

But if they're maintaining it online, selling
it, using it, then why shouldn't they be?

MR. DAVID HOFFMAN: They wouldn't be selling it
because they're agents in this example. They would only
be using it for the purposes that they were hired for by
the data collector. In my opinion the agent could be
providing that access directly, but the obligation is on
the data collector that if the agent's not doing it, the
data collector has to figure out some way to make sure
that access is provided.

MR. MEDINE: Is that a line that you're drawing
as Dan suggested between the agent acting as the agent
and when an agent chooses not to act as agent, they then
incur other responsibilities?

MR. DAVID HOFFMAN: That's right. Then they're
a third party.

MR. SCHUTZER: Then they're a data collector.

MS. MULLIGAN: But shipping companies like UPS,
et cetera, are frequently not acting as agents. At
least that's been -- Lorrie and I have done a fair
amount of research in this area.
MR. DAVID HOFFMAN: Yeah.

MS. CRANOR: Often especially if it's a small business, there's no contract between the business and the UPS. You just drop it in the UPS box.

MR. COLE: Those are two different points. They may be having no contract, but that doesn't mean they're legally not agents.

MR. MILLER: That's correct.

MR. COLE: The absence of a contract may mean you don't have an opportunity to create the protections that we're talking about.

MR. CERASALE: There's a contract with a tariff agreement. Just dropping and putting money on it, that's a contract. There's a contract with the Postal Service when you put a stamp on it, so it is a contract.

MS. CRANOR: It still happens that there is no privacy policy associated with that contract.

MR. CERASALE: That's correct.

MR. SCHUTZER: I would say --

MS. MULLIGAN: Within that context there is no agent contracting relationship.

MR. SCHUTZER: If they're just using the information to deliver the mail, and that's it, that's one thing.

MS. MULLIGAN: They're not.
MS. CRANOR: They're not.

MR. SCHUTZER: If they're using the information to maintain and create a database, then they're collecting it.

MS. CRANOR: Yes, that's what they're doing.

MR. MEDINE: It's not so much in terms of the contract as their practices in determining of how they handle the data.

MR. GEER: So if I don't explicitly throw it away then I'm a collector.

MR. SCHUTZER: Well, if I keep it --

MR. GEER: That's where this deal.

MR. SCHUTZER: If I make a record in case you want to trace it that's one thing, but if I actually create a database, that's another thing.

MR. GEER: I create a database for the three days it takes me to deliver the package. I never delete the data because it's more expensive for me to go and find it and delete it, sit down at the disk drive, now I'm a collector.

MR. SCHUTZER: Then I say you're not really a collector.

MR. MEDINE: I guess stepping back to sort of the break down that the group proposed, are people, now having gone through a discussion, fairly comfortable

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with at least the categories on the table? Are there either different categories or different organizations that people would suggest to the categories just for the group as it goes back to the table to edit a section?

MR. DAVID HOFFMAN: One thing I did hear in this conversation, this is David Hoffman from Intel, is we probably need to make a mention in a discussion of the second option what that notice means, and it may -- the different kinds of notice there may split that into two different categories.

One might be general notice, and the other might be specific notice of the actual names of the third parties.

MR. MEDINE: Rick?

MR. LANE: One question on entities, but it gets back to what was just previously being discussed between UPS and Fed Ex. I had my own small business, and I used both Fed Ex, UPS and others, Airborne, and if I had a privacy statement on my web site saying, I don't give to third parties but in fact I ship my product out, and that third party -- and that entity has that information, I don't know how Fed Ex uses that information.

To this day I don't know how Fed Ex uses that information, so is it my responsibility to go and try to
figure out all the different distribution methods that I use to figure out if that third-party information is being used inappropriately considering what my privacy statement says as a small business?

MR. SCHUTZER: That's a good question. I don't know.

MR. MILLER: Good question.

MR. SCHUTZER: I would think it was Fed Ex's responsibility if they're maintaining this is as a data collector.

MR. LANE: How is my customer -- I guess if they get Fed Ex packages they can go to Fed Ex. I don't know.

MR. DAVID HOFFMAN: I would disagree with Dan. I think it's your obligation to your customers to protect their data, and so when you're signing up shipping companies to actually be able to deliver that product, you need to make sure that they are going to protect that data as you have disclosed in your privacy statement to the consumer.

MR. LANE: I mean, we signed up --

MR. WHAM: This is such a -- this is almost an impossible standard of behavior to be hitting. What you're saying is if a customer -- think about all the ways the data comes through, right?
So you've got the customer who's originally doing it. The data passes through their ISP so the ISP has that information, and it passes over a public network, and it goes through several different Sprint's backbone and somebody else's backbone, and then it comes through your the ISP or the site that's hooked into the Internet that then hooks into your hosting system.

Then it gets to you and it gets printed out on a piece of paper for the shipping clerk, and that gets thrown into the garbage can. Do I have to indicate that your information may have been disclosed to the everyone.

I think there is a standard -- I would like to return to my colleague who is doodling to my right here from Consumers Union who put it very well. He said there is a level of gradation and of reasonableness where if I've got the fact that I shipped something to your address, I hate to break it to anybody, but your address probably isn't the most sensitive bit of information about you in the entire world.

MR. TORRES: I wasn't doodling. I was doing a graphic. I have a little person, a business, a shipper back to the consumer, so I'm trying to --

MR. MEDINE: Do you want to talk about it for the record?
MR. WHAM: So is Rick Lane is up for an FTC enforcement action because he didn't disclose the -- he used Federal Express and that --

MR. LANE: Am I, David?

MR. MEDINE: You could be.

MS. SWIFT: This is Jane Swift, and I think this is why we get to a reasonableness and an ordinary course of doing business, and some of these things about whether or not you have to give access to the information even if you're a qualified entity starts to get weaned down.

However I do want to make one point. If you are someone that's being stalked or you're a victim of domestic violence, there are a lot of people for whom their address is a secured piece of information which is why we get into all these issues because not everybody can guess what is a sensitive piece of information for everybody else.

And that's why control and notice and access and all these things are so important because for you, you might not care. Everybody in the world knows where you live but if you have somebody who's going to shoot you if they find out where you live, then it becomes a different calculation.

MR. MEDINE: I'm going to use the control,
opportunities to shift the discussion to security just
because again the clock is ticking away, and we're not
going to have time, so I think we've got the basics of
entities on the table. Obviously there's a lot of fine
tuning that could be done, and we're still staying at 30
to 50,000 feet, but unless people have strong
objections, I would like to move on just to preserve the
time at the end.

Do you wish to proceed?

MR. BAKER: I will. The security group got
along remarkably well. The security group report that
you've got here has sort of four or five sections to do
our stretching exercises, and then we lay out -- we're
talking about page 20 through approximately 28. You'll
see in here four sections of kind of clearing the ground
and then a set of options that begin on page like 23,
but in fact we at least came up with an option, kind of
combination of options that we are recommending that
deserve some discussion here because we can't recommend
it without the entire group agreeing to it.

And that is to be found on page 28 and 29. We
make the recommendation that an appropriate security
program has three elements. There's a typo in here that
disguises that. First, that every web site ought to
maintain a security program, and that the elements --
second that the elements of that security program ought
to be specified, and we give the examples of risk
assessment, planning and implementation, internal
review, training and then reassessment, a whole life
cycle.

And then the typo is in the next paragraph, our
third point should be C, an indented, that the security
program ought to meet an objective standard that it be
appropriate for the circumstances which obviously is
case by case and takes account of the fact that security
needs vary over time and there are particular
circumstances that might require more security or less
for particular data, and that cost is a consideration,
but essentially there is a requirement that you go
beyond just writing down any old thing as your plan,
that you actually meet a standard that could be defined
case by case to say, Is this an appropriate security
that you have -- program that you've written down.

The last thing that we cover is a set of
enforcement options, which we didn't provide pros and
cons on, that is a way of approaching the question of
enforcement, I think the focus on, Do we agree with
the security recommendations that came out of the group,
and everything else would probably be the best way to
handle this.

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MR. MEDINE: Anyone on the group want to comment? Mary?

MS. CULNAN: Just add one quick point, that we also argued that while notice is not enough, that the appropriate program should also be accompanied by some form of disclosure, and that we also call for consumer education since consumers are often their own worst enemies when it comes to security.

MR. MEDINE: Comments on the security? Rick?

MR. LANE: Just a couple things. First of all, I notice that you have antitrust issues in here for security, and so businesses can communicate to one another, and it's obviously something we strongly support, and there is legislation, legislation moving forward just on that point.

It's not only antitrust issues, there are a couple other issues that need to be attached to that which include liability issues, so if information is shared, that one business can't sue another business similar to the Y2K liability, the first piece of liability, not the second piece of the liability, and also issues of sharing information, if you're sharing information for security purposes with the federal government, there's a strong concern from the business community on FOIA requests.

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And I would like to have that incorporated as well, that if you share information, and I know there is some proprietary protections within FOIA, but again looking at the Davis Moran legislation, if we clarify a little bit because businesses were still somewhat concerned about that.

And then going to consumer education, that's excellent. I think the more we can do that the better. The one that gives me most concern, and we can maybe talk about it a little bit later, are the whole sides of -- the enforcement options and remedies.

It makes me a little concerned. It looks like we're now having -- I know they are options but having recommendations sound too much like legislative recommendations and, I don't know if we can drop that part out, but I throw that out for discussion.

MR. MEDINE: Deirdre?

MS. MULLIGAN: I strongly object to including reference to the Davis Moran and to creating new --

MR. LANE: Not to the Davis Moran bill but to the concepts.

MS. MULLIGAN: -- to creating new exceptions to FOIA. It's a whole huge discussion that has not happened at this table, and I really would be uncomfortable suggesting that in here.
MR. LANE: Can we list it as one of the options?

MS. MULLIGAN: Personally I will very strongly object to doing that. I'm just putting that on the table. I don't know if the people around this table are familiar enough with the FOIA issue to weigh in on it, and if they're not, then I don't necessarily know that we have the expertise here to -- I'm happy to brief people and bring in papers if that's useful.

MR. LANE: As are we.

MS. MULLIGAN: As I'm sure other people are.

MR. MEDINE: I don't know if this will help, but in what context in the self-regulatory environment would this issue arise where the government was reviewing security?

MR. LANE: Sure. There are I-SACs out there, which are sector by sector entities that are being created. There's a very good one in telecommunications. Financial Services has an I-SAC, and what the goal and what we've been working on for the Partnership for Critical Infrastructure Protection which is a Department of Commerce private public partnership that we're working on is that there's several ways of sharing information from business to business, but also sharing information to the government so that they can...
provide -- if I'm being hacked in financial services, it may be a similar attack that's happening over in the electric side or the energy side, and that the government's able to find out where those common things are and provide that information.

The concern is that under certain FOIA, that proprietary information and what's going on could be given either to competitors and/or other entities, and there's concern among the business community that they're not willing to share a lot of information because of the FOIA aspects of it.

MS. MULLIGAN: And what I'm trying to say is that that deals with sharing information with the government, and there's actually absolutely no discussion in here about businesses sharing information with the government. There's discussion about businesses working together to develop standards, and there are some liability, there are some antitrust concerns. There are no FOIA concerns.

And I don't want to throw something in here that someone may pick up on the hill and use as an endorsement as a piece of legislation or the notion that there's a wide agreement that new exceptions to FOIA are needed in this area.

I mean, I think you and I could have a
conversation about that, but I don't want the report
used for that purpose.

MR. PLESSER: Then you're supporting the
preface?

MS. MULLIGAN: I'm supporting not having
discussion of FOIA in this document.

MR. WHAM: But did you want to support the
preface?

MR. MILLER: Different subject.

MS. MULLIGAN: When there is a preface that
is -- I certainly believe we need a preface.

I just want to commend Stewart because I think
it was not an easy thing, and this is the one subgroup
that actually has a recommendation, and I think the
subgroup is very comfortable with it, and I'm hoping
that we can get a sense around the room if there is
comfort with that recommendation because I think we can
give ourselves a big pat on the back if we even had just
one recommendation, and this one seems to be shining out
there.

And on the enforcement options I would like to
differ with Rick a little. I actually think the
enforcement issues go in part to some of the issues that
people were trying to address in the summary in saying
that there are a range of enforcement options here.

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And in fact the committee does not agree on how enforcement should take place, but, however, here are the kinds of things that we think can happen, and it could be -- we can put in some different things here, but the notion that there's a range of enforcement options and therefore it's very clear that we're not endorsing any specific thing --

MR. SCHUTZER: Right, I think that was the spirit.

MS. MULLIGAN: -- would be very useful, and I think it should not be part of the security discussion but actually should be a broader part of the discussion.

MR. MEDINE: Greg and Steve.

MR. MILLER: In the interest of time I'll withdraw.

MR. COLE: Like the other commenters I found this an extremely useful and helpful section and I think it illuminated the issues very clearly, but -- there's always a but, I came away with a misgiving about it, and someone alluded to it a little earlier. There seems to be a government emphasis here or a requirement emphasis here.

It's not only that the word required is used in every section, but the sliding scale standard is characterized as a government established sliding scale.
to be contrasted with industry created standards, and
sliding scales can be created in any number of ways, not
necessarily by the government, and this would stand out
very differently than the other sections of the report.

And I don't know -- and the answer to that may be, well, it's intentional, it's security, you really
need a different level of government involvement. If that's the answer, I would be comfortable with it if we said it specifically and explained why, but if it's not the intent, I think that maybe would be helpful to clarify.

MR. MEDINE: Dan and then Dan.

MR. JAYE: Thank you. I just want to agree partially with Rick Lane about the fact that -- and I think as well Deirdre here, if we're going to have enforcement options listed in the document I think it's inconsistent to have it in only one section, but I think there's a broader question about whether or not there should be -- how much we want to talk about enforcement options in the discussion.

To the extent we talk about enforcement options in the document, I just want to point out on the create express private action option, it talks about Congress. It implies that Congress would be necessary to do that, and I believe that there's a potential for industry
groups to contractually create private rights of action. It's kind of a different concept, but I think that it's a solution that we should and is certainly worth some discussion.

MR. MEDINE: Dan?

MR. GEER: Dan Geer. Two things that I guess are important to me: First, that the question of sharing what it is you have learned from bad experience is at the present time, regardless of whether it is FOIA or inertia or I don't care what, is substantial.

Being in a position to see this, the same thing happens over and over again in a lot of places, and the ability to share that is widely understood to be dangerous; hence, it doesn't happen. Whether you want to call it dangerous because you can't share it with the NIPC and because that will then be FOIA'd, whether you consider it dangerous because if it gets to the press the markets will punish you, whatever it is.

The inability to share information about bad events is substantial, and I do not believe this committee nor anybody has a handle on how to deal with that. It is really hard.

Nevertheless, if there is any kind of white flag that we could recommend creating where that kind of stuff could take place, I assure you it would be used,
and it would be valuable, and it would be a
contribution, and frankly it would be real nice if it
didn't stop at the edge of the U.S. territorial waters
because this kind of stuff, it has nothing to do with
territorial boundaries whatsoever, end of story.

The second thing in the question of who should
enforce and so forth, I'm uncomfortable with enforcement
stuff at this stage because I don't think we know what
the problem is well enough despite all this work to know
what all the solution is despite all this work.

Nevertheless, the insurance industry is coming
in this space, and they're coming hard and they're
coming fast and they're looking to do something that as
the electronic portion of our economic life grows, the
necessity of the insurance idea grows. I assure you
underwriting standards are going to cause things to
happen that frankly I don't think this organization,
this building could cause to happen.

They'll come from economic reasons, and they'll
be strong, and that is just around the horizon. I can't
go much further than that, but it really is just around
the horizon. What a reasonable underwriting standard is
for people that handle lots of other people's data is a
hot topic in the biggest insurance firms right now, and
I guarantee that this will have some impact and quite
frankly really soon.

If there's anyway we can encourage saying economic results to lead us in the direction we want to go, I'm just telling you that the horsepower is out there, and it's only a question of whose hand is on the steering wheel, but the horsepower is there.

And I'll shut up. I think I've beat that in the ground. I hope you get the idea. There's an awful lot of demand for solutions to security, way beyond the question of handling private data. There's an awful lot of demand for this, and if there's a way in which we can help with this, I think the answer would be how to determine recourse in the event of bad things is the primary way that you would be able to steer where this goes.

Something bad happened. Therefore in the American society it must be somebody's fault. Nothing ever happens by accident. Therefore, how are you going to allocate recourse? That's the only steering wheel I submit that you have.

MR. MEDINE: James?

MR. ALLEN: I would like to compliment the group with coming up on a set of recommendations. I think they're a very good set of recommendations that I can support with one minor change. The point A says
that there should be a security program that applies to personal data that the entity has collected, and while our charter may be to deal with information that's collected online, I would certainly hope that we would want a security program implemented that applied to all personal data that the entity had in its possession and control, not just data it had personally collected.

MS. MULLIGAN: I think we could probably agree to that. Stewart, can we agree to that? I think that was the intent.

MR. MEDINE: Good.

MR. ALLEN: It's just the previous discussion was very specific about the use of the word collector.

MS. MULLIGAN: It was, you're right. We will change it to hold or something.

MR. BAKER: Yes.

MR. MEDINE: Other comments on the security section?

MR. WHAM: I have one comment. Given that in all four of our sessions it seems like we have these really, really difficult chart things on access in the morning and then we reserve time on security and just blow right through it, I wish I was the security expert and being on that side of the fence.

MR. MEDINE: In your next life.

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MS. MULLIGAN: We've had four hour phone conversations six times a week.

MR. TORRES: Then since we have time, I'll add my two cents. Job well done on this section. It looks really good, and I think it might serve as a template for the rest of us on the other sections as to how to format it. Thank you, for spending four hours on the conversation.

MR. MEDINE: Thanks. Dan?

MR. SCHUTZER: I would like to move it to the process discussion that we had because it seems to me --

MR. MEDINE: At that point, let me just make a suggestion of schedule, and people can come back to me, but we did reserve time for public comment. I thought once we finished the security, we can take up public comment, take a break and come back and wrestle with the process until we're tired of wrestling with the process and then we call it a day, but if you want to do it in a different order, it's your committee, you can decide.

MR. PLESSER: We said we would come back to the issue of preface as well.

MR. MEDINE: That's part of the process.

MR. CERASALE: One question. I agree with that but one question back on security. The way we have liabilities set up in here I think we discussed it but I...
just want to reiterate we're going to try to get the
liability over towards that, also to the providing
access area.

   MS. MULLIGAN: Yeah, I think there's a question
which hopefully I think the mandate is clear, that the
liability piece has to be prominently worked into both
the access considerations and security considerations,
and it's a question of how to do it.

   MR. CERASALE: That's fine. I just wanted to
reiterate.

   MR. MEDINE: Are people amenable to proceeding
to public comment, break and then process issues?
Okay.

   Is there anyone in the public who would like to
make a comment? I see a couple back there. If you
could please identify yourself once you get the
microphone.

   (Discussion off the record.)

   MS. MARTIN: Thank you. I am Dianne Martin, the
chief policy officer for GeoTrust, which is an Internet
start-up company based in Portland, Oregon. GeoTrust is
developing a suite of Internet based products and
services designed to reduce risk in the online business
to business transactions by creating a technology based
trust infrastructure that will increase confidence in
ecommerce by enabling companies to evaluate the
authenticity of the identify, reputation and performance
capabilities of other companies.

I've heard some allusion to this issue already
in this committee. My comment centers around the
similarity between the privacy and security concerns
related to protecting the personally identifiable
information of individuals and the confidentiality and
security concerns related to protecting critical data
for commercial entities, data such as transaction data,
digital signatures, trade secrets.

Now, we recognize that this committee is
chartered and operating nominally under the Bureau of
Consumer Protection and is focused primarily on
consumers, but we're very concerned that focus be given
to the rapidly expanding value of business to business
transactions online.

So when you make your recommendations to the
Commissioners, we therefore would request that the
committee consider including comments on broadening the
definition and principles for protective data to include
legal entities such as companies along with the concerns
already stated for individuals.

Thank you.

MR. MEDINE: Thank you. Identify yourself, please.

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MR. CATLETT: Jason Catlett from Junkbusters.
Two comments, one responds to Jerry Cerasale's solution that there are costs associated with access, and they should be noted. Certainly there are costs, and I think it would be good to have, to the extent that you can document this, those costs both in terms of the capital costs of providing the infrastructure for that plus the variable cost of doing that over and over again so it would be good to document that.

I think it's possible that the net result of providing access may be to lower costs to both businesses and consumers. For example in the Fair Credit Reporting context, we've seen the quality of data has risen since the access requirement was mandated, and we may see that similar sort of effect. We may not. So I would like to see that documented.

Secondly, just an observation, this is the first of these sessions that I've been to. I know I've been generally impressed with the discussion this morning and how well informed and diligently people are working, and I would like to say thank you all for giving your time to this common cause.

MR. MEDINE: Other members of the public?

MR. LEE: Hi there. I would like to say thank you for the opportunity to allow the public to speak.

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Once again my name is Dennis Lee. I'm from a company called IFSec, and we're an information security firm based in New York. Actually I would move to nominate all of you for the next Emmy award for providing the public with such wonderful drama and conflict.

But in any case, I have a very short but important suggestion, and that is as you are putting together your recommendations, if you can please consider making your recommendations timeless or at least stand the test of time.

The reason why I say this is we are -- our firm is getting a whole new class of clients these days in the world of web development, and lo and behold, folks, if you haven't seen this already, this is what the new web browser looks like. It's on a much smaller platform, and there other issues concerned with this, and that is these devices, there are many similarities with this type of wireless technology that you guys are talking about that can apply here with the wireless world as well.

For example, these devices have authentication quite often built in, and there's also strong encryption applied as well, but there are also differences and that is, for example, of all the web sites that -- the wireless web sites that we've been looking at, very few
if any have privacy policies on them.

So, in other words, if I use this little device to browse a wireless web site, you won't find that many web sites that have privacy policies for example. Yet the rules still apply. That's number 1.

Number 2, we've also been finding out that a unique identifier, we've been talking about unique identifier, doesn't necessarily link to an individual. However, in this case it may be linked to an individual, to a phone number receptor, so there may be perhaps new issues we may need to contend with.

It's probably too late perhaps for you guys to throw in sort of the wireless perspective to all of this, and it may mean in the future the FTC may need to revisit this issue, but my recommendation again is please keep us in mind. Think of the future and make sure your recommendations are as timeless as possible.

Thank you very much.

MS. GAU: I would like to comment.

MR. MEDINE: Thanks for your comments.

Tatiana?

MS. GAU: With respect to the second point you made as to some unique identification methods that are being used in the wireless space, in particular the cell phone numbers, as most of us here probably know last
month Sprint PCS got taken to the table on that issue, and they have backed off of that practice, and I want to emphasize that as one illustration of how the market forces do come in to play and push companies in certain directions, particularly when the public cries out and condemns certain practices by a company.

But I would also like to commend you for bringing this issue to the table because indeed this is happening very fast with TV, all kinds of devices and as some of you may know, AOL is very much active in that space where the rules are completely changing.

MR. MEDINE: Are there other public comment?

MR. MILLER: David, response to the commenters?

I would like to hear from the gentlemen given what you're talking about -- Greg Miller, MedicaLogic. We actually have a lot to do in the wireless space within health care because of electronic medical record devices, wireless devices. Given what you're talking about really goes to what I'll call the transport layer, do you have some things that you think the committee should look at specifically that you think are unique or different in the wireless space given it's wireless access protocol, et cetera, et cetera, that wouldn't already be covered by this?

MR. LEE: Yes, but I would think to be fair it
does come rather late to be introducing all of this at this late date. That's why I said at the end it may mean that the FTC may need to revisit this issue in the future, but probably in the very near future as well though.

MR. MILLER: That's what I'm trying to draw out.

MR. MEDINE: Deirdre.

MS. MULLIGAN: One thing that actually the P3P working group has dealt with recently, and I actually would make a move or motion to actually perhaps add something to the definition that at least gets to a part of this, is there is one significant information explicit, I think it would be useful for us to reflect that other category of information within our definitions.

I think most of the other discussion is still very general, and so I'm not sure if -- I too have some concerns about whether or not we're going to be outdated in a week, but I think at least by doing something that takes our hat off and says, Yes, we recognize there's different kinds of data created by these kinds of devices I think would be a nod in that direction, so I don't know if people would be opposed to that or Lorrie or myself I think can float the language.

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MR. MEDINE: Lance?

MR. LANCE HOFFMAN: I want to follow up Tatiana's point because if we're doing this for record which we may use to produce the report on, I read and I assume it can be confirmed by the gentleman to my right, that Intel in its latest version of the next chip has gone and again backtracked from the identification information it had in the previous Pentium model.

MS. MULLIGAN: We want to applaud that.

MR. DAVID HOFFMAN: Yeah, I can confirm that.

MR. MEDINE: I think we have another member of the public who would like to comment. Identify yourself, please.

MR. SMITH: Christopher Smith. I'm from a company called EIdentification in Massachusetts. I would like to thank the FTC for putting this on and opening it up for the public. This was very good for small start-ups like myself.

We are about identifying and authenticating individuals online, and there are certain industries out there where personal information is necessary in order to conduct business such as the online alcohol market. There's also car rentals and such areas as online pharmacies where age is significant, and any privacy issues by identifying these sorts of organizations and

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protection the information I think would be critical because they need the personal information.

MR. MEDINE: Thank you very much. Other comments? Thanks for all the members of the public who commented.

MS. MULLIGAN: I wanted to respond. It's that age and identification don't necessarily have to be coupled. And I think it's a challenge for -- if you think about it, I wave my driver's license around and people look at it and they determine my age. They actually don't -- 7-Eleven doesn't keep a record of my identity, and there's a challenge in the online environment to figure out techniques that allow me to reveal my age and to verify my age in some way but not to leave the same kind of detailed identification trail behind.

MR. SCHUTZER: There are some business models based on that premise already.

MR. LANE: I just wanted to comment about the wireless because I noticed, as I look around the table, I am not the only one that's using my cell phone to access the Internet right now, not that we were doing other things while we were here.

MR. MILLER: I'm picking up a lot of data here.

MR. LANE: One of the concerns about a lot of
recommendations even if we took them all at face value is when -- if there is a movement towards regulation in this area. The cell phone and the wireless communication is a huge issue just because -- exactly what am I going to be able to read on my little screen and what does that mean, and do you just not -- are you not able to access web sites because it's just physically impossible to have all these different requirements from security and so on and so forth that are mandated on companies where in fact in the wireless market, which is the fastest growing area, new technologies are being developed all the time that allow -- and there's a concern that specific recommendations on here is security, here is all these different things that are going through and in some folks mind could really deter development of this new wireless market.

So I think it's an interesting idea to have another committee reflect it in what we're talking about today to keep it timely.

MR. MEDINE: Great. Let me, unless people want to barrel through, suggest just a short break and perhaps during the break you might have a chance to chat with some of your subcommittee members who you might want, one or two people to serve on a drafting committee. Maximum 15 minute break.
(A brief recess was taken.)

MR. MEDINE: Before we get into the nitty-gritty of report preparation, I would like to introduce to the group the director of the Bureau of Consumer Protection Jodie Bernstein.

MS. BERNSTEIN: Thank you, David. It's wonderful to see you all again. I know you've all had a marvelous time, and I know you're going to miss coming in here like once a month, so I'm going to propose we have another advisory committee. No, no.

MS. MULLIGAN: Just another meeting.

MS. BERNSTEIN: Just another meeting. Just another meeting, and I really just wanted to convey to you the thanks and the gratitude of the Commission as a whole. Each Commissioner has mentioned how useful this group has proven already and how much we all appreciate the length of time, the amount of work you all have done. It's just been extraordinary, so that really is my role.

I had looked to see what are the benefits of this group so far because of course everything has to be cost benefit these days, so one of the costs was David and I gave the shirts. That's also a benefit.

The other one that I particularly wanted to convey is I think you all know that our person upstairs

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at The Top of the Trade, who is not a federal employee but rather a contractor, somehow I've developed some kind of an obligation to him that I have to produce a certain amount of business. Otherwise he won't make his numbers, you know, at the end of the quarter, so today he said, You've been doing good, you've been doing good, now are you going to have another one of these things, so any of you would like to come back for lunch regularly, it would be a great benefit to me as I do my cost benefit analysis for running the bureau.

In all seriousness, we really feel very grateful and really do thank you for all of it. I want you all to wear your T-shirts from now on so that you will remember us, not forget us, and we are looking forward to your report. So is the Commission.

We've briefed all of them regularly, those who haven't been able to be here, and again my thanks, David's thanks. Our staff has been working with you and very much appreciate the whole effort.

I don't know how soon again we will ever have an advisory committee unless it's all of you. Do you have any questions that you would like to ask me while I'm here for my brief interlude? This is one of my Loretta Young appearances where I sweep in and out. Remember those?

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MR. TORRES: Frank Torres, Consumers Union. I just want to commend you and your staff and certainly David and everyone else involved in this process. They've been very diligent in keeping us in mind and providing a free flow of information as we've gone about our deliberations and they're to be commended, not just -- a lot of us deal with your staff on a lot of issues, and it's always been very professional and very knowledgeable and the access has been there, no pun intended, and we appreciate that very much.

MS. BERNSTEIN: Thank you, Frank. We have made every effort to have all of our processes be as open as we think government should be to everyone, and I think this was illustrative of how much value there is in an open process, so we'll continue to do that and look forward to David finishing up here the nuts and bolts, and I won't keep you here any longer because I know you've been here all day.

So thank you very much again, and we'll see you soon.

MR. MEDINE: Thanks, Jodie. And also while we're giving out thanks, I wanted to thank the people who are behind the advisorycommittee@ftc.gov, Allison Brown and Ellen Finn who have really made all of your meetings proceed as smoothly as they have.
MS. BERNSTEIN: Nobody in this room is to try to hire them. You'll get kicked off the committee.

MR. MEDINE: Okay. Now that the fun stuff is over, let's get to work, and --

MR. COLE: Jodie's last comment was you were going to finish up.

MR. MEDINE: I'll adjourn the meeting, and we'll call it that.

There are a number of things we need to think about. Maybe one thing that will be helpful up front is to look at the calendar because that ultimately both because of the charter and because of the Commission's specific needs for the report I think will drive the agenda, and that is we do need again to deliver a report to the Commission on May 15.

MR. WHAM: I would like to challenge that assumption right now. What we're trying to do is we're trying to jam 20 pounds of potatoes into a 10 pound sack. I can state as someone who came out from the West Coast, my email box on this topic was empty when I left at 6:30 in the morning on Thursday.

There were 27 messages in my box when I arrived in Washington, D.C. at four o'clock in the afternoon, just a sign of how we are always putting stuff through.
We have a lot of drafts we need to comb through. We've got some drafts that need to go back for all the people that participate and so forth.

I think May 15 is nice, but is not a drop dead must have, and the Committee’s authority runs through the end of the month, and if we have that extra time, you would end up with a better product.

MR. MEDINE: I refer you to the second page of the charter, quote the duty section which states that the advisory committee will provide advice and recommendations in the form of a written report to the Commission describing options for implementing reasonable access to, and adequate security for, personal information collected online and the costs and benefits of each option by May 15, 2000.

MR. WHAM: With all due respect I believe the FTC has the power to change that charter if they are so inclined.

MR. MEDINE: I don't believe so. The charter was approved by the General Services Administration, and that is the charter we've been operating under, and I don't believe it can be. Also just --

MR. COLE: Just for argument's sake, what would happen if the committee didn't submit the report by May 15?
MR. MEDINE: The committee would not have a report. Alex.

MR. GAVIS: Could you submit the executive summary and then the report to follow?

MR. WHAM: We'll never get take the executive summary done so that doesn't matter.

MR. GAVIS: I withdraw the question.

MR. MEDINE: The report also obviously will be very timely in the Commission's consideration of the results of our survey of web sites, so I think it's in everyone's interest to get the report in on time, so it could be part of the Commission's consideration of the 2000 online survey.

But again besides that, I think the charter does bind the committee to produce whatever it's going to produce by May 15.

MS. GAU: David, I just want to refer back to the fact that at some point we're all going to have to vote on the report, and if there are a certain number of us that think that the report is still not fine tuned enough and hasn't -- does not reflect all the views and all the issues that we have discussed, there are going to be nos that are going to come through there, which are going to make it such that no report is submitted if the process goes as I understand it.
MR. MEDINE: Well, again remember there is an option that every committee member has to submit a separate statement of their views, so you can procedurally as is sometimes done, vote to say that -- I guess as committees and Congress do vote the Senate nomination to the floor, not because they support the nominee but they think the floor ought to -- the full Senate for instance ought to consider the nominee even though they personally may not be thrilled with them.

So you have an option to procedurally submit the report to the Commission with your views as to the weight to be given to the report or any particular set of recommendations. Again that's the committee's option, and the committee -- obviously the committee has to proceed by a majority vote in terms of whether it submits a report and on what date and in what fashion.

MS. MULLIGAN: Majority, not unanimity.

MR. MEDINE: That's absolutely correct.

MR. PLESSER: Is there an opportunity perhaps for a short meeting or another meeting because I think part of the problem is really to have some of this, if we did go on to a drafting committee if it's -- and I mean I think that between the chamber, there are rooms that we could do it in.

MR. WHAM: We would be happy to host it out in

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Redwood City for you.

MR. PLESSER: I mean, there may be -- I think part of the problem is this is the last meeting where the group as a whole can supervise it. Is there an option at the Trade Commission or an option in a hotel or can we have a meeting without you?

MR. MEDINE: No, you may not. No more than a quorum of the committee can meet without it being a committee meeting, and if a committee does meet, it has to be in public session.

No, I believe -- I need to review this more carefully I believe there is flexibility both in the charter and the bylaws to have another meeting. While we are bound by the charter to submit whatever you're going to submit by the 15th, there is flexibility of the additional meeting.

Now, whether the committee had so much fun you want to do this again. Personally we would be happy to host that meeting, absolutely.

MS. MULLIGAN: Could we do it on the 5th so we could actually have an in person vote? I know that's two weeks away.

MR. MEDINE: Can I consult?

MR. LANE: That's one week away.

MR. WHAM: Is it possible to amend the charter?
so we've got another week?

MS. MULLIGAN: It's not.

MR. MILLER: You can't amend the charter.

MR. WHAM: The GSA cannot?

MR. MEDINE: What is the question?

MR. COLE: It's impractical and they can't, but
to say --

MR. WHAM: I really feel like we're being boxed
into something which is going to put us in a really
substandard product where there's some really excellent
work just ticks me off. I can't believe that we
cannot -- does it -- are other people of agreement that
having to come up with a completed report by the 15th is
going to yield a substandard product versus another
week?

MR. MILLER: Greg Miller here. While we've been
talking, being in the web production for years I just
did a little napkin calculation here. Just for reality
check, based on the number of pages we have to date,
plus some assumptions about front matter and back matter
and production and everything and a committee to pull
that together, I really believe we're realistically
looking at 41.5 hours of production time, so start from
the 15th of May, back up 41 real hours.

MR. WHAM: Two days.

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MR. MILLER: You're volunteering?

MR. WHAM: You were saying it was Internet based.

MR. MEDINE: I'm sorry. I'm advised by counsel here that I think there may be a requirement under the Federal Advisory Commission Act for public notice of Commission -- notice 15 days in advance, so I don't see how as a practical matter that can be accomplished.

The Federal Trade Commission as a body approves federal register notices, so I don't know if we can obtain a vote of the Federal Trade Commission today but I think it would be required. I'm not even sure if we publish it first, so I think there may be practical impediments to having a meeting.

We're not opposed to it, and I don't think the charter prohibits it, but I think we may be procedurally unable to accomplish that. One second. Richard?

MR. PURCELL: Richard Purcell. It's crunch time, and we've known this for four months now, and if we are not prepared to produce a quality product on the 15th of May, then it's a shame we're not, not on anybody else. This is a known deal.

Where I come from there's a saying when you are faced with these kinds of deadlines which is what if you don't eat and sleep, and that's pretty much how it
goes.

So I come from an environment where you don't eat and sleep right at the -- in the final hours, and that's how you produce the product on time, but I think it's absolutely --

MR. WHAM: Windows 95?

MR. TORRES: All you types on the West Coast.

MR. PURCELL: It's a critical element of the credibility and integrity to produce a quality product on time.

MS. MULLIGAN: This is why everyone should think carefully if you're one of the two people that your committee has selected because you may be on the don't eat and sleep schedule.

MR. MEDINE: Let me suggest that while we don't have much flexibility as perhaps we would like, we do certainly have all possible flexibility up until the 15th, and if you submit something to the staff, we will be responsible for copying it, duplicating it and so forth. The question is so that you have basically until the 14th to get something to us --

MS. SWIFT: Can I just say that just from having done some of the subcommittee reports and being the person in charge of producing them, that I think the most useful expenditure of the next 25 minutes would be

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to figure out if it's going to take 41 and a half hours, what are the deadlines that you expect everybody to meet, firm deadlines in the next two weeks because the truth is while there may have been 27 emails in the last 12 hours, I would put forward from my experience, and this isn't an indictment of anyone who's served on a committee with me, that that was pretty standard practice, that the first seven days we had things out there.

And that's just how people function, and it's not just in Microsoft. It's in government and everywhere else. When there's a firm deadline, people meet it, so I think usefully we should determine what needs to be done between now and the 15th, how we're going to achieve it and what the deadlines are, and everyone can be clear, and if you decide not to participate because you can't meet the deadline, then you lose.

MR. MEDINE: Well, then I would turn it to you and offer suggestions for deadlines in terms of what -- you guys are close to the work product and know what needs to be done.

MR. LANCE HOFFMAN: Following up right before lunch when I said my understanding is we have to do this, this, this, this, this and I went through a little
chart I had drawn, and what I didn't say is I put dates next to it so let me put this out as a straw person.

Today is April 28. I would propose that by the -- that there be a subcommittee that meets, a drafting committee, if you will, that produces what is going to be a major effort, not much eating and sleeping -- produces a draft by May 4.

MS. SWIFT: Is that a draft of the report or the report what we're also calling a preface and/or executive summary.

MR. LANCE HOFFMAN: Just to put something on the table, that is a draft of the report with an executive summary. I am silent on whether or not there is a preface. Then that draft goes out by email to people, and by April the 7th.

MS. GAU: May.

MR. LANCE HOFFMAN: I'm sorry, by May 7 comments are received by everybody, comments are back in.

MR. SCHUTZER: Wait. The draft is done May 4. Some of us won't even see it until the 5th.

MR. LANCE HOFFMAN: This is Internet time. You can disagree with this, but I'm just putting it on the table. I'm with Richard's school of thought on this.

MR. SCHUTZER: That means the draft is out and distributed by the 4th.
MR. LANCE HOFFMAN: By 11:59 p.m. on May the 4th the draft is distributed.

MR. MEDINE: Which time zone?

MR. LANCE HOFFMAN: Eastern Time. By May 7th, 11:59 p.m. Eastern Time, comments are in. Comments are returned to the drafting committee. The drafting committee takes these into consideration, makes whatever changes it deems appropriate and produces those by May 9 so by 11:59 p.m. on May 9, that is the -- now you have the draft final report.

By May 12 persons or individuals who wish to make comments, dissents, whatever they're called to go in the entire package, I gather that's how this works, produce those so that by midnight or 11:59 p.m. on May 12 those are done. They all go into the FTC so that allows for some transmission difficulties and such, by the beginning of business on May 13 the FTC has this material.

MR. PLESSER: That's a Saturday.

MR. SCHUTZER: The only suggestion might be a meeting on May 12.

MR. PLESSER: Given it's a weekend date.

MR. LANCE HOFFMAN: Make it May 15.

MR. SCHUTZER: So suggest a meeting like May 12 where we can all sit here.
MR. LANCE HOFFMAN: Impossible because of the notice constraint.

MR. MEDINE: We can't meet.

MR. JONATHAN SMITH: We can't meet.

MR. TORRES: Can we meet in separate groups?

MR. MEDINE: You can meet in groups that are smaller than a quorum committee. Let me just add on to that schedule. We need to build in a voting period of time on the final report. Now, that may be from the 9th to the 11th, that's fine. Whatever you want to decide the schedule you impose on yourself, but we do need an affirmative vote by the committee.

Let me just signal, I think we should take a vote at the end of today that we are approving this procedure and these deadlines and these voting schedules, but we'll also need individual votes on the final transmission of the report to the Commission. Again it's not an endorsement of the report, just a transmission of the report. Rick, then Deirdre.

MR. LANE: Rick Lane, U.S. Chamber. In terms of the quorum and not being able to meet and some of those technicalities.

MR. MEDINE: That's the law.

MR. LANE: I'm going to say this as a non lawyer, but during the ecommerce Commission meeting,
they had a similar problem where they were trying to
meet, and what they did is they sent actual Commission
members out of the room so there was never really the
quorum that met the criteria.

The chamber has the ability to break rooms down
into very small rooms, and if the groups were meeting
separately and not all together at the same time in
different drafting committees and they weren't meeting
-- I don't care if it's opened up to the public,
that's not a concern of mine, but if they are meeting in
separate meetings and not meeting all at once, is that
technically a violation of the quorum requirement?

MS. MULLIGAN: I would be uncomfortable with it
as a lawyer.

MR. LANE: My thing is the notice issue. I'm
just trying to offer a suggestion.

MR. JONATHAN SMITH: Is it realistic to think
that this group of 40 people could assemble a quorum in
the next couple weeks anyway? I'm sorry, but I'm not
going to be there. It's not going to happen. I can --
you can probably eliminate enough people just physically
from making a meeting.

MS. MULLIGAN: That in fact supports in the
suggestion that doing it my email would probably
better, allow more people.
MR. JONATHAN SMITH: I can't be there.

MR. COLE: I have another question. If this was a board of directors, which it's not, under the corporate laws of every state we wouldn't be able to take a vote except at an in person meeting, this would be a deliberative body.

If our charter and the GSA rules and all that prohibit us from having a meeting, is it clear that we're permitted to take a vote knowing that we may not meet to discuss our vote? Something's wrong there.

MR. MEDINE: The charter does not specify the mechanism by which the vote is taken, so we have been operating under the assumption that the committee by a vote in person could authorize an email vote.

MR. COLE: Why do we have these procedures at meetings? It's because there's an interface between public accountability, public observance and participation and the roll of kind of a private group advising the government, so we're talking about having a vote that's as private as it gets.

MR. MEDINE: The vote will be on a public document and the public --

MR. COLE: The result of the vote.

MR. MEDINE: The result will be recorded publicly.

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MR. GEER: Are all the emails to date public record as well? Is that what you're getting at?

MR. MEDINE: I believe they are.

MS. MULLIGAN: They are FOIA --

MS. GAU: They are not. They are not.

MR. MEDINE: I don't believe they're exempt from FOIA.

MS. MULLIGAN: If they went to the Advisory Commission's mail box I think they're certainly subject to FOIA.

MR. MEDINE: They're not on the web site, but I don't think they would be exempt from FOIA.

MR. TIERNEY: I don't know how -- how are you doing over there? Are you getting every word?

I'm very uncomfortable with any attempt to circumvent not only the letter of the law but the spirit of the law. It's not only wrong because it's against the law. It also subjects this committee which is -- whose work is going to be viewed in many forums, hopefully if we've done our job to the kind of inappropriate criticism that we don't need, so I feel really pretty strongly about that being a law enforcement person.

I just wanted to respond, the second point is if we have enough faith in our drafting committee of ten and the right individuals, isn't it ten?
MS. MULLIGAN: Eight I'm hoping.

MR. TIERNEY: Two for the preamble so I came up with ten, if we have enough respect for those, and we have the right people and we've chosen wisely, I think this is not a major problem. I think all views would be represented, and since this is a 100 percent email literate organization, I think that we can use it appropriately.

MR. LANE: David, if I can clarify. I wasn't attempting to say anything. That's why I was asking as a non lawyer, not a lawyer, the technical question if we were trying to get together.

MR. TIERNEY: I think we all appreciate the frustration.

MR. LANE: I didn't want to do anything that would cause anyone to be uncomfortable.

MR. TIERNEY: I think we ought to get past that. We know the time frames we have to work in. We know the law we have, so we do the best we can with what we've got.

MS. SWIFT: Can I just ask if we agree with the time line that Lance gave?

MS. MULLIGAN: No, and that's what I'm trying to get back to.

MR. MILLER: We're trying to get through this.

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MS. MULLIGAN: I as somebody who I think from my group will be on the small committee, we actually didn't talk about it completely, Rick and I talked about it. I talked to Richard, Jerry, but I would much prefer that we try for a preliminary draft, a second draft and a final draft because I think that if there are only eight people representing 40, I would much rather get it out twice even if only half the people get comments back than only get it out once because I would just feel much more comfortable.

And so I would like to suggest that we actually try to have a preliminary draft out on Wednesday the 3rd, try to have a second draft out either at the end of the day on Friday the 5th or on the 8th, allow comments back in, try to have another draft out by 7:00 p.m. on the 10th or maybe 9:00 in the morning on the 11th and have votes on the 12th.

And I know that that pushes the voting, but I think it allows people to read and digest more and comment, and because if we're talking about eight people, I really want to make sure that those eight people get what 40 people want.

MR. SCHUTZER: Some of us -- I would like to see the extra draft, but some of us, we have fire walls and things, we don't always get these drafts like in
real time. Sometimes I'm getting it like a day late.

It might be impossible to vote if I get it late.

MR. TORRES: Maybe we should do it by fax.

MS. MULLIGAN: Just the principle of having more than a preliminary draft and a final draft I would like to have an intermediary.

MR. SCHUTZER: I agree with that, but give us at least two days.

MS. MULLIGAN: So, Lance, I don't know if you think we can work with that, and maybe it means that the voting, people can vote the 12th, the 13th, the 14th, I don't know.

MR. PLESSER: We have to build in a time for the concurrences too.

MR. LANCE HOFFMAN: That's true.

MS. MULLIGAN: My hope would be that by the second draft people would be on notice that perhaps they should be writing a dissent. I don't think you're going to go from a report you love to a report you hate between the preliminary and the final draft.

MR. LANCE HOFFMAN: Can you reiterate those dates one more time?

MS. MULLIGAN: I'm not tied to the dates. I was thinking maybe the 3rd, the 5th and the 10th.

MR. SCHUTZER: Draft 1 on the 3rd, draft 2,
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
voting on I think with some minor changes. I really do think Deirdre is right, it probably takes two drafts.

MR. MEDINE: Jim?

MS. MULLIGAN: I think it probably takes two drafts.

MR. MEDINE: Jim?

MR. TIERNEY: I agree with that and would like to also put a little caveat on it that might solve some of the confusion we're having, and Frank embarrassed all of us over here unfortunately off the record and said maybe we should do something by fax, which was a 20th century device that was developed for reasons which we've all forgotten.

I think we can do this by email. I have a suggestion, a humble suggestion. I am as I stated before and as you all know, if you don't know you will soon, a deep adherent to using Microsoft products, and on my Microsoft email product, there are two buttons. One says reply and the other says reply to all.

Now, part of the confusion I think we're all having logistically is many of us think our reply is so valuable we hit reply to all, and as a result, people, it is a huge mess because people who are responding to things they got not four or five days ago but four or five hours are irrelevant.
It's very confusing, so again we come back to the fact that if we have faith in our eight person committee, if we try to keep our remarks -- and I will be making comments, but I will be directing them only to that committee, I think it would be much less confusing and allow them the opportunity to synthesize them in a rational way, and that makes the second draft more important because in a sense by delegating this authority to the committee, we're asking them to use some judgment here in synthesizing this.

So that would I think clarify a lot of what I see as just confusion because, this will be a shock to many of you, but I don't read all of the emails that you send. So this would make it a lot easier I think for those.

MS. MULLIGAN: On that process issue, I would like to suggest that we set up a system, for example, I'm commenting on access section 2, so that we can sort all of them and look at all the access section 2 questions so that the comments are things that are easy for us to incorporate.

MR. MEDINE: We will also make efforts to put on our web sites the drafts to help those who have delayed email, and others obviously are free to post it on their web sites if they want as well, but we will
certainly make best efforts to try to avoid ancient
technologies and --

MR. WHAM: From a process standpoint if you're
going to have them up on the web site you need to keep
them out of PDF. You need to keep them in an editable,
document Word documents I think, unless anybody has a
problem with that.

MR. MEDINE: One second. One second. Fred?

MR. CATE: I just wanted to I think second what
is now the amended what I'm going to take as a motion
from Deirdre with the deadlines being the 3rd, the 8th
and the 11th with the assumption being that responses
will go back only to the drafters and not be distributed
to everyone and that concurrences or dissents or
whatever we're calling the separate statements would be
delivered sometime in the period between the 8th and the
11th.

So that the drop dead date for receiving those
would be the 11th so that others could see them and
consider them when voting. So if that was the motion as
it now stands amended, I would like to second it.

MS. SWIFT: I say we move to a vote.

MR. MEDINE: Motion, comments? Jonathan.

MR. JONATHAN SMITH: I have a question though
which is I've somehow lost in my brain the structure and
role of these comments, where they will end up in our
documents can someone reiterate.

MR. MEDINE: Talking about the individual
committee members comments.

MR. JONATHAN SMITH: That's correct.

MR. MEDINE: The comments on the report, those
will be standard at the end of the report. They will be
transmitted to the Federal Trade Commission, and they
will be transmitted along with the Federal Trade
Commission's larger report on online privacy which will
be copies of the committee's work.

MR. JONATHAN SMITH: Will those be voted on?

MR. MEDINE: I'm sorry, what is that?

MR. JONATHAN SMITH: Are those outside the scope
of the vote? I'm trying to understand.

MR. MEDINE: I don't think you'll be voting on
individual statements which includes individual
statements. You will be voting on the whole package.

MR. JONATHAN SMITH: What is the date for those
statements?

MR. MEDINE: What I'm hearing is the 11th, 11:59
Eastern Standard Time.

MS. CULNAN: And they go to the drafting
committee go to the drafting committee or to --

MS. MULLIGAN: I think we can go straight to the
MR. LANE: We're not going to edit.

MS. MULLIGAN: Actually I don't know. They have to go to you, but I think Fred made an important point, that they should be available so they can inform as Steve said other people's deliberations.

MR. MEDINE: Right, which we'll do at the same time the final report is circulated.

MS. MULLIGAN: Right. Well --

MR. MEDINE: Or earlier, preferably but no later than the 11th.

MR. COLE: In that vein, you characterized the vote as a vote for transmission of the report to the Commission. Is that the vote that you're expecting to vote on?

MR. MEDINE: That's what I propose the committee do which this committee -- members will have stated either their views will be reflected in the body of the report or in their individual statements, so the vote would be to transmit that report along with the attachments, individual sections to the Federal Trade Commission.

MR. GAVIS: I thought actually the reason for having individual statements was because we were thinking that we were going to have a report that
was not going to reflect a lot of different options, that we were going to end up coming up with recommendations in the report, and ultimately people were going to write their own recommendations later.

My sense is that I think it would be much better if we created a report that really stood for the group and that individual statements if anyone wanted to write a letter on the public record they could do that and get it submitted with the public comments.

But my sense is is that attaching lots of different statements and having lots of different conflicting views, et cetera, is going to be very confusing for the public when they read it and may sort of serve cross purposes for us.

MR. MEDINE: Just let me reflect the prior discussion which is that people did feel -- hopefully people's view will be represented in the report and won't be a need for any statements, but people seemed to feel at a prior meeting strongly that they at least have the opportunity to submit an individual statement if they felt the report didn't fully reflect all the options or views or pros and cons that they felt about the particular issues so again --

MR. COLE: I feel strongly we should stick to that prior discussion, but I think we should clarify.
One of the reasons someone may choose to file a comment or whatever you're calling it is not because they think all the views weren't reflected, but they want to comment on the sum total of the report and its meaning to them or it's implication or whatever else the First Amendment allows them to say.

MR. MEDINE: Right. We will not edit your comments. They will be attached to the report as submitted, so you can say what you want in those.

MR. SCHUTZER: Before you call it to a vote, I would like to make two comments. One is that I think we shouldn't be talking access 1, 2, anymore. Let's talk about the whole report as edited so I can see the whole report, number 1.

Number 2, for some of you who might get confused if it's reply to all but I find that a good process for me to absorb and understand and keep track of what everyone is saying. It doesn't mean that I will be commenting, editing. The onus will be on the drafting committee to take care of all of those things and produce the next version, but I would appreciate a reply to all so I can see what's going on and just absorb it.

That's the way I synthesize this thing.

MR. MEDINE: Yes?
MS. MULLIGAN: Can I respond to that? I'm not suggesting not to reply to all. It's in the sorting, if we get -- if every single person makes 300 little comments throughout the entire document, that if we can sort them so that we can look at the preface comments.

MR. WHAM: You can actually do a merge within Word.

MR. SCHUTZER: Nobody else but the drafting committee, but for the rest of us we want to see what's going on.

MS. MULLIGAN: I want you to see what's going on, but if the email subject lines allow us to sort so we can make sure, okay, we looked at all the comments that were relevant to the security section, it's very helpful, having done this before.

MR. SCHUTZER: There shouldn't be sections anymore. There should be comments on the draft because it's all integrated.

MS. MULLIGAN: Absolutely. But the draft will still have subtitles.

MR. MEDINE: Let's slow down comments so the court reporter can keep up. Ron?

MR. PLESSER: Yeah, just a couple procedural questions before we go on to vote. I mean, there's been some assumptions around the table asserted about eight
people on the drafting committee. Lance certainly made a recommendation. I don't think we've had a full discussion of how that will be resolved at all.

I think there's been some assertions about it, but I don't think it's been a discussion, number 1. Number 2, I do think that while we do need to come back to this conversation of whether or not we try to do a summary, whether or not we try to do some kind of preface so that we have instructions on the other four things, I think we need to get some instructions on those two things because those are substantive.

So I'm happy to talk about those things substantively, but if you want to have a vote on the dates, that's okay, but I think those other things almost either come first or have it to be resolved as well.

MR. MEDINE: It might not be a bad idea to resolve this so when people vote they know what the process is that's going to lead to the various drafts being circulated, and we will be responsible for this. That seems to be an advisable approach, but Deirdre?

MS. MULLIGAN: I actually just wanted to second Lance's suggestion that we were anxious, we thought we had the authority to dump the document together. We didn't feel like we had two people from each subgroup.
We wanted make sure that we had the people who the
subgroup -- I've said, yeah, I'm happy to do it. My
subgroup didn't say, Deirdre, can you do this for us.
And we wanted -- it's an authority issue, and I
would like to have two people that the subgroup would
like to have represent them.
MR. MEDINE: Could we go to the four subgroups
now and poll them for who they would like. Yes, Mr.
Kamp?
MR. KAMP: Yes, I think we ought to do that, but
I suggest we have a subgroup for a preamble, but I
presume we're going to have to have a preamble
discussion. I'm going to strongly recommend that we do
a preamble. I think we have to have an explanatory
position there.
I'm not trying to take a position on any one
thing, and I also would like to recommend that Frank
Torres be one of the two, and that Ron Plessor be the
other of the two in that preamble discussion.
MS. MULLIGAN: I actually would like to make a
counterproposal, that the preamble and summary should be
part of the drafting assignment of the people who are
responsible for drafting so that the document's
consistent.
MR. MEDINE: That can be consistent with the
recommendation if that's what people want and have Frank and Ron represent those concerns. Dan and then Lance.

MR. JAYE: We've been talking about how much work we have yet to get done, and we started off the day talking about how difficult it was to do the data reduction to come up with an executive summary versus a preface that talked about our process.

And I'm going to sort of suggest that we take the Gordian Nod approach here and commit the sacrilege of issuing a report that has no executive summary. That basically forces everyone to wade through the details, that there's a lot of important points that everyone has brought up here, and that any attempt to try to reduce it to some summary is going to basically eat up what limited time we have left to produce the report and arguably be less informative to the critical targets of this report, so...

MR. MEDINE: Lance and then Greg.

MR. LANCE HOFFMAN: I could speak to that but I'll let other people speak to that. What I want to say is I think once people -- whoever we decide to put on the drafting committee, once they're on the drafting committee, they in essence lose their, if you will, status as representatives except for they know what happened in the subcommittees because at that point we're all --
this is a subset of the entire group that has a task. Its deliverable is to produce draft 1, draft 2 and the final report. So that's the first thing.

In that regard I would argue against having two more people to do what I call the preface because I think this group now if we make sure it's representative, and I would like to see before we leave here and before in fact, Ron, we vote on this, who are going to be the eight proposed people, whoever they are, on the committee, and I'll stop there.

Once we do that I think we should be okay given the constraints we're under.

MR. MEDINE: Greg, I'll call on you, but can we maybe go through the four groups and put on the table who they recommend and see if that maybe addresses people's concern about representation. Access one?

MR. WHAM: I might recommend an alternative. Instead of going through the four groups, who wants to be on this drafting committee? I think if we may have kind of a self selection, it will be obvious who.

MR. MEDINE: I think it will need representation from each group.

(Discussion off the record.)

MR. LANCE HOFFMAN: Can I suggest a two minute recess so the groups don't have to quibble in public?
MS. MULLIGAN: I second that.

MR. MEDINE: Really two minutes because we're getting --

(Discussion off the record.)

MS. SWIFT: Access subgroup 1 will have Richard Purcell and Jamie Allen.

MR. MEDINE: 2?

MR. SHEN: Andrew Shen, for access 2 it will be myself and Ron Plesser.

MR. MEDINE: 3?

MS. MULLIGAN: Rick Lane and Deirdre ?

MR. MEDINE: Four, security?

MR. BAKER: Stewart Baker and Lance Hoffman. We also request that we be able to use Greg Miller as an alternate because he has promised if we do that he'll draft the preface.

MR. MEDINE: Which will be unobjectionable.

MS. SWIFT: We haven't totally decided on the preface yet, and actually our sub group in nominating our appointees, gave some direction to where we thought they should go on those issues.

MR. MEDINE: So it's Richard Purcell, Jamie Allen, Andrew Shen, Ron Plesser, Deirdre Mulligan, Stewart Baker and Lance Hoffman. Ron?

MR. PLESSER: I would like to make a
suggestion. When you and I talked about this early on, you said one of the reasons we put academics on here is that they can help with the writing, and it is terrific, and I am very positive that Lance is on it and he certainly is a recognized academician.

MR. LANCE HOFFMAN: What's he going to say next?

MR. PLESSER: Fred Cate, who just left, is a wonderful writer and has a lot of ability to pull it together, make it a committee of nine or make him kind of the officio or something. I would think having Fred particularly with his talents pulled into the immediacy of the process would be helpful and important. He knows I'm doing it.

MS. MULLIGAN: Which committee was Fred on?

MR. SHEN: I think he was on access 2.

MR. PLESSER: Part of the problem is he was on vacation for three weeks but he really -- anyway that's my suggestion.

MS. MULLIGAN: How does access 2 -- Stewart and I think the security group have a specific reason. Is there consensus among the access 2 committee that that would be good?

MR. PLESSER: I don't think he's being -- Fred's being presented as a representative of a particular group. I think the sense too is that
everybody here is now kind of representing the whole. I think Fred is very talented and it would be helpful, but that's up to the group.

MR. MEDINE: Jim?

MR. TIERNEY: I often say I work for 50 equally gifted and talented attorneys general, and I think it's fair to say that we are all 40 of us equally gifted and talented or we wouldn't be here, and I say that with all respect to Fred.

I like the way this committee looks. I've listened here for all these meetings, and I think that I have such faith in this committee I have no doubt that they might be able to out-source pieces of this as it goes along in their discretion, and I think we ought to let it go at that.

Fred is enormously capable, there are other people who are enormously capable, and you ought to use your judgment to go where you need to get the information down to the drafting in your own discretion. I don't think any of us will second guess it.

MR. MEDINE: Fred can be an information intermediary.

MR. PLESSER: He can be a resource.

MR. MEDINE: Are we comfortable with going with
the eight as proposed and then having out-sourcing being
Fred and Greg as it seems appropriate?

MR. TORRES: Salute.

MR. MEDINE: So we have a group. Let me just
specifically address the issue of executive summary
versus preface, is it the -- I think we have a couple
alternatives. One is to delegate to the group the
drafting of an executive summary and preface if they
feel that's appropriate, circulate it and see if it's
something people can support or not or make a decision
here about that. Richard?

MR. PURCELL: Comments that were made briefly
in our huddle had to do with a couple things. First of
all, an executive summary essentially is designed to
state a conclusion, to state at a high level the
supporting arguments for that conclusion and point to a
document that has the due diligence that was used to
reach that conclusion. This is not the kind of document
that's going to support that.

Now, that being said, I think that it's
important that we may want to write -- I'm going to
throw another word on the table here. I think it's
important that we write a prologue to this report,
which provides the appropriate set up for readership,
and additionally we may want to at the -- we may want to
break this into a chapter format in the sense that it
can be supported by a table of contents that provides
easy access to the depth of material that's going to be
supported in here.

And there's ways that the documentation
process can work to do that quite readily as long
as you use the right products and the best
products.

MR. KAMP: Owned by one company.
MR. WHAM: Not for long.
MR. PURCELL: Even then it would only be one
company.

I think the essence of what we're trying to get
at in the discussion around preface is how do we set
this up so the reader's prepared to address the material
in a contextually appropriate way? We can do that.
That's how -- that's what you use a prologue for.

You say, Here's the deal, you're about to read
something and here's the context within which this
should be read or under which it was written. We can do
that.

We can then provide a table of contents that
allows the user to quickly figure out what the format or
the structure of the document is and go to specific
places in that document for specific needs that they

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might have, and I think given that kind of a structure, we may be able to accomplish this by picking it up as pieces that have good structure to hold it together.

MR. MEDINE: I'm seeing a lot of nodding in the room. I'm going to see if we can grab a consensus before we lose it and say that -- at least give that a try and see as the draft circulates if that serves their needs.

MS. SWIFT: I just have another sort of deadline piece. I think we agreed or we're assumed going to agree, now that we've got the committee appointed that we will have the first draft on the 3rd, the second draft on the 8th, the third draft prepared by the 11th.

We have to add dates in between the time by which you circulate the draft, you need all of us to get comments to you so that you can then produce the draft so they have to be a date between the 3rd and the 8th and a date between the 8th and 11th just for the functioning of the drafting committee.

MR. BAKER: Why don't we just circulate that, leave that to the committee.

MR. MEDINE: I don't think that has to be a formal voting matter. There is one other date though that needs to be added which is the -- well, two dates: The date that voting opens and the date voting closes by
email on the final draft.

So I guess I would propose that voting open at 12:01 a.m. on the 12th and close at 11:59 p.m. on the 14th.

MR. COLE: I thought the 15th.

MR. MEDINE: The 15th is the day it's due to the Commission. Commission staff would appreciate knowing and having that date to put everything together.

MR. PLESSER: Can you repeat that.

MR. MEDINE: Physically from the morning of the 12th to the evening of the 14th to complete voting so we can deliver it to the Commission as the charter calls for on the 15th.

MR. CERASALE: Eastern time?

MR. MEDINE: Yes, Eastern Daylight Savings Time.

MS. MULLIGAN: You're saying if we give it to you on the 15th, you'll copy it and deliver it to the Commission all on the same day?

MR. MEDINE: Yes, yes. You can conclude your voting the last possible minute on the 14th and we will come in fresh, bright and early on the 15th and take care of getting everything copied and taken care of.

MR. KAMP: Delivery date, does that have anything to do with Labor and Mother's Day on that Sunday? Never mind. I'm sorry.
MR. MEDINE: At least there's not Friday the 13th in there. Is that it?

MR. TORRES: David, one comment that I have. Since email is not yet -- my system sometimes goes down. Sometimes it takes a while to get things circulated. I think as soon as we know what dates -- now that we know what dates the copies are supposed to come out by email can we have -- do we call you if we didn't get it so we can have another method to do that?

MR. MEDINE: Yes, you can call us.

MR. PLESSER: You can put the draft on the web sites too.

MR. MEDINE: We'll put the draft on the web sites too, but that does take some time as well, but we will do our best to get that done as quickly as possible. If you haven't received your email call us. We will fax it to you or if you're local make it available on a hard copy for you to pick up, whatever we can do to assist you in getting it as quickly as possible.

MR. TORRES: I would suggest the same thing with the votes. I take it that if you see that certain people haven't or you haven't received emails from certain people, there could be lots of reasons for the glitches, that you all make the call.

MR. MEDINE: That will be a little trickier
because we're calling for a vote over the weekend, so
you can have an option if you want of calling or faxing
your vote in or --

MR. LANE: I was going to say because you may
have sent it over the weekend. It may not go through
for some reason. You don't know about it so I would
think that at ten o'clock on Monday morning if you
haven't received a vote from Frank or myself or somebody
on the committee, maybe give us a call because we may
have thought it went through and there's no way to track
it.

MR. MEDINE: Just for formality, I'm going to
suggest that the voting deadline be noon on Monday,
though with an aspiration that everybody complete their
votes on the 14th so that we only have to do catch up
reminder kind of calls Monday morning on the 15th. We
will make best efforts to vote by 14th but I don't want
to be past the voting deadline where we're taking late
votes and have a dilemma of counting them or not
counting them.

MS. CULNAN: One quick question. The drafting
committee will decide who's going to email it out and
basically we'll know to whom to reply and remind us
about putting what in the headers of the message to make
your job easier?
MR. PURCELL: Yes.

MR. CERASALE: The response is to go to one person? I had a note that David asked them to have the FTC send us an email with the specific email addresses of the eight on the drafting committee so I don't have to try and figure out what they are.

MR. PURCELL: That's fine.

MR. CERASALE: Let's get it. But how do you want it? Do you want the email to just one person or all eight?

MS. MULLIGAN: No. What I would propose to do is when we send out the preliminary draft we will have everybody in the cc line that you should respond to so that if you reply to all, it will come back but what we'll ask.

MR. CERASALE: No, it won't. It will go to everybody on the list.

(Discussion off the record.)

MS. MULLIGAN: I'll give you the addresses in the cc line and you can take them and paste them in so you only reply to the cc or --

MR. PURCELL: May I make a suggestion, that the designated federal officer can set up an alias that all eight people would be included on so you have a single draft ACOAS email address so that will make it much...
less difficult?

MR. MEDINE: Your DFO would be happy to do that.

MS. BROWN: The problem is if somebody emails something at 8 p.m. to the advisory committee, email backs, it may be maybe 8:30 the next morning before I send it out to the drafting committee so you may --

MR. MEDINE: We can create an automatic forward?

MR. PURCELL: Yes, you can.

MR. MEDINE: We will forward it to the drafting committee.

MR. PLESSER: One thing is I do think from my own perspective since I am not a good note taker, I think a lot of people have very good comments today, and we have some of those notes but before the beginning of next week if people could email to me and I assume to others kind of the hit list of the definitions that need to be played with, your kind of suggestions or recommendations on going through here and again over the weekend so if we can get that on Monday, Tuesday, I think that would be much easier, would be very helpful to me to see the substantive comments, not that everyone will be taken but I think it will give us some guidance.

MR. MEDINE: Your DFO would also like to suggest a service to the committee, if you like, given the rich
discussion we had today, we would be willing to email
the transcript of today's session on Monday with the
caveat that it's uncorrected it might be helpful in your
deliberation.

We'll also obviously post an edited version when
we've had a chance to review it, but it sounds like because
of the pace we're on it might helpful once we get it in
to email it to the group. I'm seeing lots of nods so
we will do that.

MR. TIERNEY: I had one specific question again
logistically, if I'm to comment on three different
sections of the report, is it your suggestion to us that
I send you three separate emails?

MS. MULLIGAN: Yes.

MR. TIERNEY: I thought that's what you said. I
wanted to make that clear.

MS. MULLIGAN: Yes, and I think when we send out
the directions for how to comment on the attached
document, it will give you very specific details about
what to put in the subject line, and I know it's a
little bit of a hassle on your end, but it's way more of
a hassle on our end and it will make sure that we
actually get to everybody's comments.

But to just go off of that, I think it's
important that we get those second dates that you talked
about. I don't want to wait and send you guys out a
note that says, oh, you have ten hours to respond, so
for example, if we're going to get the preliminary draft
out to you at 5:00 p.m. Eastern Standard Time on the
3rd, I want people to have comments back to me by 5:00
p.m. on Thursday the 4th.

I know it's 24 hours but if each one of you
makes 12 comments, it's a lot more for us to incorporate
than it is for you to read a document, and so we get the
bulk of the time, not the commenters. So if I can
suggest that we put a deadline -- I'm happy to do
Thursday at twelve o'clock Pacific Standard Time.

MR. LANCE HOFFMAN: Thursday what?

MS. MULLIGAN: The document that will go out on
the 3rd, you have until midnight Pacific time Thursday
to get comments back which means 3:00 a.m. in the
morning for those of you who really like late nights on
the East Coast.

Draft 2 which goes out on the 8th, similarly
comments should be back to us on the 9th by midnight
Pacific Standard Time.

MR. PURCELL: That gives us 48 hours to
complete the task.

MS. MULLIGAN: I know it's a little more than 24
hours on the other side, but I really think that's what
we need to do if we're going to be able to do it.

   MR. MEDINE: I'm sorry, comment to the drafting
committee for the first draft should be submitted when?

   MS. MULLIGAN: Monday the 1st, 12 Pacific
standard, midnight Pacific standard.

   MR. RICHARD SMITH: When you send out the draft
will you remind us?

   MS. MULLIGAN: Yes.

   MR. GAVIS: Do you want comments right in the
Word document, or do you want them in the email?

   MS. MULLIGAN: I would prefer if people put
changes in the email. There's too many people. Even
if we use track changes we will not be able to keep
track of them.

   MR. GAVIS: No Word in email.

   MS. MULLIGAN: Sorry.

   MR. LANCE HOFFMAN: Quick suggestion to the
Commission. I suggest when you get a vote you
acknowledge the vote to somebody and that way you'll cut
down on your back and forth.

   MR. ALLEN: What is the voting process, and will
there be any visibility to the committee members during
the voting period as to the status of the vote?

   MR. MEDINE: Well, the email should be sent to
advisorycommittee@ftc.gov. I suppose you can copy

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the others.

MS. SWIFT: You won't ask for a vote. You will assume we know to start voting.

MR. MEDINE: We're going to entertain a motion that there be a period of time during which votes will be received so people will send an email during that period of time to record their vote. You're all free to copy each other on your voting email.

MR. COLE: When you're ready for that motion, I would like to suggest that you tickle your calendars to send everyone a reminder that voting is now open.

MR. MEDINE: Okay.

MS. CULNAN: Then people will know --

MR. MEDINE: Jonathan?

MR. JONATHAN SMITH: On the voting process I may not be email capable at that time. Is it possible -- is it acceptable to telephone call in?

MR. MEDINE: The problem with the phone call is the record.

MS. CRANOR: I have the same problem.

MR. MEDINE: Fax.

(Discussion off the record.).

MS. CRANOR: I have the same problem. I may not have email during those three days.

MR. MEDINE: What about fax?
MS. CRANOR: I may not have fax either. I'm going to be traveling. I don't know what I'm going to have.

MR. MEDINE: I think it's difficult --

MS. CRANOR: I could definitely have a phone. I could call somebody.

MS. SWIFT: Can I ask a question, maybe this is not the thing, but don't you have somebody who can just go to your computer and send an email from it?

MS. GAU: That's authenticity.

MS. MULLIGAN: Lorrie, if you would like to call me, I would be happy to transmit your vote. If you would like to call me, I would be happy to transmit you vote.

MS. CRANOR: Okay.

MR. JONATHAN SMITH: Is that acceptable?

MR. MEDINE: Yes.

MR. JONATHAN SMITH: You're happy with that.

MR. GAVIS: When is the report going to be made public?

MR. MEDINE: On the 15th I believe.

MS. GAU: I'm sorry, David, I thought prior to the vote we were going to actually see what the entire package would look like, including any dissents that were going to be part of the materials.

MR. MEDINE: Comments, that would be by the
11th. Maybe I can summarize where I think we are.

MR. LANCE HOFFMAN: Before you do, one question on the vote, David, I'm sorry? Is the vote going to be a rolling, that is, if person number 1 votes on the minute one after voting is open and then voting is open for two or three days, okay, is everybody going to see each person's vote as they come or are they going to come in and be closely held until the end?

MR. MEDINE: Again because this is occurring over the weekend, what I would suggest is the members of the group copy each other on their email so you can see, but it will be very difficult for us to have it be a public process.

MR. WHAM: Based upon what we're doing here, where we're trying to do achieve a consensus where we've got three drafts all the way through, where we get to have individual comments, can anyone see a situation where you're not going to vote to a yes? Isn't it pretty clear that everyone is going to say yes?

MR. JONATHAN SMITH: No, you're right.

MR. MEDINE: We reserve that question to you. You have a chance to record your vote.

MS. MULLIGAN: Send the no votes to everyone on the list.

MR. LANCE HOFFMAN: What if a hacker did that?
MR. MEDINE: So if I could summarize where I think we are. The first draft will be circulated on the 3rd, comments to the drafting committee by the 1st (sic).

The second draft will be circulated on the 8th.

MS. GAU: Wait, 3rd and to the 4th.

MR. MEDINE: 5/1 midnight, comments due to the drafting committee. 5/3 the drafting committee will circulate the first draft.

MS. MULLIGAN: Yes, end of day.

MR. MEDINE: Comments are due back to the drafting committee the next day, 5/4 midnight. The second draft will be circulated 5/8, comments due back midnight 5/9; final draft to be circulated along with individual comments, those who choose to make them, 5/11 midnight, voting opens 12:01 a.m. on the 12th of May, voting closes at 11:59 a.m. at noon on the 15th of May.

We are encouraging people in good faith to vote by midnight on the 14th so when we come in on the 15th, those who have not voted we will make our best efforts to contact and make sure that --

MR. PLESSER: Will you draft up the voting statement because I think it's really your job to do that and then circulate it so we know exactly what we're saying yes and no to?

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MR. MEDINE: We would be happy to do that.

MS. CULNAN: The other question is I have written down that we're supposed to send our comments if we choose to make them to the FTC on the 11th. And so at that point how will they -- are they going to then be sent back to you to be put into the final package?

MS. MULLIGAN: There's a question. I think -- could we have.

MS. CULNAN: We cc you?

MR. MEDINE: 5/10, would that be easier?

MS. MULLIGAN: Yes.


MS. CULNAN: To the drafting group?

MS. MULLIGAN: Here's the question. I think if it's amenable, and I have to talk to the group, I have commandeered our web person to do a nice Quark version of this so the report looks good which we could then turn into a report to send to you all.

I don't necessarily feel like we need to also handle all the individualized statements. You've already created a template, et cetera, so if those were just sent directly to the Commission, that's okay, and make sure that -- it lessens the risk that there's a transmission error because it's only going one step instead of two.

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MS. CULNAN: The question is how do they get into the final package that we see to vote? If they're going to the FTC and you have the final report, is the FTC going to send it out?

MR. MEDINE: We will send them out or post them on the web site by close of business on the 11th.

MS. MULLIGAN: Or maybe the individual statements do go to the full committee.

MR. MEDINE: Again you're always free to copy your fellow committee members on anything you send.

MR. COLE: I think we're getting a little confused. It seems to me when we're asked to or we're encouraged or allowed to send comments, we would like to see the final report to which you're commenting, so it seems that the comments ought to be following the distribution of the last draft, and then those comments plus the last draft get voted on. The comments wouldn't get voted on, but you would see the whole package when you vote.

MS. SWIFT: I think the problem is we're not sure we have enough time to do that.

MR. WHAM: And I think we'll be close enough on a final that it's not necessary to see the absolute final draft.

MS. MULLIGAN: My hope is that the only changes
we're making on the final draft are really we missed
typos, that they were -- my hope is that the first draft
and the second draft are the ones that we're really
shaping, and that the third draft -- you should know.


MR. COLE: That's never been my experience. I
know there's always been a hope.

MR. MEDINE: You know. We're losing people, and
we have to take a vote while we still have a quorum or
there will be no report.

MS. MULLIGAN: I would propose that we could try
--

MR. MEDINE: I would suggest we lock in a vote
before people leave.

MS. MULLIGAN: Can I make a motion?

MR. MEDINE: We will have no report if we don't
have a vote with a quorum?

MS. MULLIGAN: On behalf of the drafting group,
unless somebody else shoots me down, that we could say
that we could get the final report circulated by the
11th at 4 p.m. Eastern Standard Time so that people
could make their comments if they wanted to subsequent
to having that and still get them in by Thursday at
midnight Pacific Standard Time.

I know it means that you're going to be working
after hours.

MS. SWIFT: You know what, I really think we're going to have vote right now, before people are missing their planes, as to whether or not when we adhere to this process, whatever the deadlines are, we agree to take a vote, the process that's been established in order to submit a report directly to the Commission.

MR. LANE: I second that motion.

MR. MEDINE: Let's take a vote. James Allen?

MR. ALLEN: Aye.


MR. CERASALE: Do you have to do a roll call?

MR. MEDINE: All in favor say aye?

(Chorus of ayes.)

MR. MEDINE: Opposed say no.

(No response.)

MR. MEDINE: Majority. Thank you very much.

(Time noted: 4:31.)

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CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: P004807

CASE TITLE: ONLINE ACCESS AND SECURITY

HEARING DATE: APRIL 28, 2000

WE HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by us at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of our knowledge and belief.

DATED: MAY 1, 2000

SUSANNE Q. TATE, RMR

DEBRA L. MAHEUX

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE

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