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RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

June 1, 2016

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20553

Dear Chairman Wheeler:

On April 1, 2016, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) proposing novel privacy and data breach notification requirements on broadband Internet access service providers (ISPs).[1] Creating a disparate set of rules for *some* members of the Internet ecosystem is the wrong approach and ignores the last four decades of development in the U.S. The inconsistencies in the proposed rules undermine the public's expectation of a seamless and contextually relevant online experience.

To date, the Federal Trade Commission (FTC) has been the primary arbiter of consumers' rights and expectations with regard to Internet privacy. Under the FTC's enforcement-oriented approach, all participants – from back-end database service providers to consumer-facing content creators – have existed under the same set of privacy rules. As a result, Internet deployment and adoption has thrived, consumers have quickly adopted services, and providers of both access and services continue to develop new products and services to meet consumer demand.

Notwithstanding the evolving definition of broadband, since 2000, broadband penetration has gone from three percent of the population to 67 percent;[2] Internet-connected mobile devices have penetrated 68 percent of the American population;[3] and, broadband providers have covered 95 percent of the United States population.[4] In 2014 alone, broadband providers invested $78

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[1] *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, 31 FCC Rcd 2500 (2016).
[2] Pew Research Center for Internet and American Life *at* http://www.pewinternet.org/three-technology-revolutions/.
[3] *Id.*
[4] *See* Broadband for America *at* http://www.broadbandforamerica.com/issues.

billion in infrastructure to serve American consumers. All this investment activity has benefited the nation through increased communication, increased access to services, and increased economic activity. A recent study indicated that in 2014, the broadband and information communications technology sector was directly responsible for nearly 6 percent of the 2014 U.S. GDP – over $1 trillion.[5]

Despite the success and economic benefit that a sensibly regulated Internet brought to the U.S. economy, in February of 2015, the FCC reclassified broadband Internet service providers as common carriers under Title II of the Communications Act of 1934.[6] The activities of common carriers, as services highly-regulated by specialized agencies, have long been exempt from FTC authority. By reclassifying broadband, the FCC removed broadband Internet access service providers from the FTC's jurisdiction, creating a two-tiered Internet. This is exactly the kind of system the FCC's 2015 Open Internet Order purported to prevent. Now, to solve a problem of its own making, the FCC seeks to establish an entirely new regime of prescriptive privacy regulations unique to broadband Internet service providers. The FCC's approach summarily rejects the proven model of the FTC, which preserved the value of the "end-to-end" Internet, in favor of a rulemaking that somehow manages to be both unclear and overly prescriptive.

The FCC attempts to justify special treatment for ISPs based on its conclusion that "ISPs are the most important and extensive conduits of consumer information and thus have access to very sensitive and very personal information that could threaten a person's financial security, reveal embarrassing or even harmful details of medical history, or disclose to prying eyes the intimate details of interests, physical presence, or fears."[7] The FCC offers no evidence for this conclusion which stands in contradiction to a recent report by Peter Swire, privacy czar under President Clinton.[8] According to the Swire report, ISPs do not have a comprehensive ability to collect data on consumers, nor are they unique in their data collection capabilities.[9] The FCC, however, seems to gloss over the facts, skips the data collection process that would have surfaced these facts, and proceeds to single out ISPs for privacy requirements that do not match up to the privacy challenges consumers face.

The FCC claims that it is not reinventing the wheel, but this assurance is belied by its recent actions and the plain text of the FCC's proposed rules. For example, there is no state law that sets a ten-day deadline for notification to consumers after discovery of a breach. Yet, this is exactly what the NPRM proposes. Ample testimony has been given to Congress and state legislatures about the time it takes after a breach to ensure that the compromised system is

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[5] Kevin A. Hassett and Robert J. Shapiro, "The Impact of Broadband and Related Information and Communications Technologies on the American Economy" (rel. Mar. 23, 2016) *at* http://internetinnovation.org/images/misc_content/Report_on_the_Economic_Impact_of_Broadband_-_Hassett-Shapiro_-_Rev_-_March_23_2016.pdf.

[6] *Protecting and Promoting the Open Internet, Report and Order on Remand*, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*2015 Open Internet Order*).

[7] *FCC Privacy NPRM* at para. 2.

[8] Peter Swire, Justin Hemmings, Alana Kirkland, "Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others," Georgia Tech Institute for Information Security and Privacy Working Paper (rel. Feb. 29, 2016) *at* http://www.iisp.gatech.edu/working-paper-online-privacy-and-isps.

[9] *Id.*

secured without putting more information at risk.[10] Requiring a company to start preparing notification letters before it contained the breach is unprecedented and irresponsible. This is only one example of many that raise concerns.

Ultimately, the FCC's proposal for new ISP-specific privacy rules seems to miss the point: rather than serve the public interest, these new rules will create public confusion. By subjecting data to multiple and varying privacy regimes within a consumer's single Internet experience, consumers will be left to question which privacy rules apply. For example, in today's Internet ecosystem, a single company theoretically could collect data from an operating system, a browser, a content website, an app, as well as a retail broadband service. In this situation, the FTC would continue to regulate all but the retail ISP offering, which would be subject to new and different rules under the FCC's proposed rules. It is unlikely that consumers will quickly grasp the regulatory arcana that changes the way their data are protected.

Rather, it is more likely the disparate privacy regimes will distort the marketplace. Disparate sets of rules for similarly situated entities create opportunities for regulatory arbitrage. Although we may not know in what ways this arbitrage will manifest, it is almost always the consumer who suffers in the end. Consumers will bear the impact of delayed innovation, consumers will suffer from deferred deployment, and consumers will suffer from inefficient design as companies seek to avoid a more burdensome and costly privacy regime. This unjustified bifurcation of the U.S. Internet privacy regime is particularly troubling at a time when there is so much focus on setting international standards on data flows.

The free flow of information over the Internet has allowed for one of the greatest technological transformations of the last century. This was no accident. Around the world, countries are attempting to create their own version of Silicon Valley because they see the economic value generated when a government gets out of the way and lets its citizens innovate. The FCC's proposed rule endangers the regulatory framework that has made the U.S. the world leader on the Internet and created hundreds of thousands, if not millions, of U.S. jobs.

We recognize that even in a world where the FCC erroneously considers the Internet to be common carriage, consumers deserve to be protected. However, rather than a prescriptive rulemaking, we believe that the FCC should create a more consistent privacy experience for consumers by mirroring the FTC's successful enforcement-based regime. We know that the FCC can successfully implement such an approach. As recently as March 7, 2016, the FCC relied on an enforcement action to address concerns over the use of "supercookies" by ISPs.[11] Knowing that an enforcement-based approach at the FCC, modeled on the FTC's success, can work to protect consumers without injecting new complexity and uncertainty into the Internet economy, we urge you to reconsider your approach.

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[10] *See e.g.* Written testimony of Michael R. Kingston, "Protecting Consumer Information: Can Data Breaches Be Prevented?" Subcommittee on Commerce, Manufacturing, and Trade, February 5, 2014, http://docs.house.gov/meetings/IF/IF17/20140205/101714/HMTG-113-IF17-Wstate-KingstonM-20140205.pdf; Response of Ms. Madigan, "Protecting Consumer Information: Can Data Breaches Be Prevented?" Subcommittee on Commerce, Manufacturing, and Trade, February, 5, 2014, p. 40, and response of Mr. Noonan, p. 85, http://docs.house.gov/meetings/IF/IF17/20140205/101714/HMTG-113-IF17-Transcript-20140205.pdf.

[11] *In the Matter of Cellco Partnership, d/b/a Verizon Wireless*, Order, File No. EB-TCD-14-00017601, 31 FCC Rcd 184 (2016).

Sincerely,

Fred Upton
Chairman

Greg Walden
Chairman
Subcommittee on Communications and Technology

Michael C. Burgess, M.D.
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: The Honorable Frank J. Pallone, Jr., Ranking Member

The Honorable Anna G. Eshoo, Ranking Member
Subcommittee on Communications and Technology

The Honorable Janice Schakowsky, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade