

July 11, 2016

VIA EMAIL

The Honorable John Thune, Chairman
Committee on Commerce, Science & Transportation

The Honorable Bill Nelson, Ranking Member
Committee on Commerce, Science & Transportation

The Honorable Fred Upton, Chairman
Committee on Energy & Commerce

The Honorable Frank Pallone, Ranking Member
Committee on Energy & Commerce

The Honorable Greg Walden, Chairman
Subcommittee on Communications & Technology
Committee on Energy & Commerce

The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications & Technology
Committee on Energy & Commerce

Re: *Letter from legal scholars and economists concerning the Federal Communications Commission's Broadband Privacy NPRM*

Dear Senators Thune and Nelson, Congressmen Upton, Pallone and Walden, and Congresswoman Eshoo:

We, the undersigned experts in the law and economics of the Internet, have significant concerns with the proposal of the Federal Communications Commission (“Commission” or “FCC”) to adopt new data privacy and security rules for broadband Internet access service providers (“ISPs”) under Title II of the Communications Act.

We support strong consumer protection and believe that the Commission has a role to play in protecting consumers’ data privacy and security. For several reasons, however, we find that the proposed rules take the wrong approach and would harm consumers, competition, and innovation.

As a fundamental matter, the proposed rules do not reflect the technological and economic nature of the Internet environment, in which ISPs are just one of many types of entities that have

access to and can use consumers' online information to provide services, including access to ad-supported content. The proposed rules would single out ISPs for heightened regulation, imposing strict opt-in consent requirements on their use and disclosure of customer information.

By contrast, other online entities—such as social media networks, operating systems, browsers, data brokers, and search engines—would operate under the Federal Trade Commission's ("FTC's") strong but flexible opt-out consent regime, which would allow them to continue collecting, using, and sharing information about consumers' online activities for a variety of commercial purposes. The FTC's framework focuses on stopping practices that truly harm consumers, allowing companies ample space to develop innovative and beneficial products and services.

As a result, the FCC's proposed rules would not only distort the marketplace in ways that are likely to increase costs to consumers, but also mark an unprecedented and unwarranted departure from the successful balance that has governed the Internet economy for the past couple of decades and which has led to substantial innovation, investment, competition, and growth.

Moreover, the asymmetrical regulatory framework that would be created by the proposed rules likely would confuse consumers and negatively affect the Internet economy.

Specifically, the Commission's proposal to require ISPs to obtain opt-in consent before using or disclosing consumers' data for most activities is diametrically opposed to the approach that the FTC has taken for decades and to which consumers have become accustomed. Consumers may not understand that the choices they make through their ISPs' opt-in mechanism do not apply to other participants in the Internet ecosystem, even though these other participants will be collecting exactly the same data and using it for exactly the same purposes (e.g., online advertising) as ISPs.

In addition, the free flow of data is the lifeblood of the Internet economy. **The proposed heightened consent requirements, however, would impede consumers' access to information about new online services and cost-savings that may be of interest to them and therefore would reduce ISPs' incentives to develop new services, reducing competition and innovation online.**

The Commission's failure to take these costs into account exemplifies its broader failure to conduct a full economic analysis of the proposed rules.

Finally, the Commission's proposed choice rules are unconstitutional because they would uniquely prohibit ISPs' use and disclosure of information for marketing purposes without obtaining consumers' opt-in consent. **By treating ISPs differently from other online entities, the proposed rules would create a discriminatory, speaker-based regime. Such a regime is presumptively invalid and subject to strict scrutiny, which the proposed rules could not withstand.** Nor could the proposed rules survive intermediate scrutiny: by requiring opt-in consent

for most first-party marketing and other activities, regardless of the potential for consumer harm, they are not narrowly tailored to advance a substantial governmental interest.¹

Fortunately, there is another path forward. **The Commission should adopt rules modeled after the FTC’s longstanding and highly successful approach, which the FTC staff highlighted in its comments filed in this proceeding.** This technology-neutral approach — which applies an opt-in consent requirement to the use and sharing of sensitive information such as financial, health, children’s, and precise geolocation data as well as social security numbers, plus robust notice and opt-out choice for other data uses — would provide strong, time-tested, and consistent privacy protections for consumers across the Internet ecosystem while fostering continued innovation, competition, investment, and growth.

Respectfully submitted,

(Affiliations provided for identification purposes only)

Laurence H. Tribe

Carl M. Loeb University Professor & Professor of Constitutional Law
Harvard Law School

Richard A. Epstein

Laurence A. Tisch Professor of Law, The New York University School of Law
The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution
The James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, The University of Chicago

Robert Corn-Revere

Partner
Davis Wright Tremaine LLP

Robert D. Atkinson

President
Information Technology and Innovation Foundation

Jane Bambauer

Associate Professor of Law
University of Arizona
James E. Rogers College of Law

(continued)

¹ See also Professor Laurence H. Tribe and Jonathan Massey, “The Federal Communications Commission’s Proposed Broadband Privacy Rules Would Violate the First Amendment,” WC Docket No. 16-106 (May 27, 2016) (white paper detailing how the FCC’s proposed rules would violate the First Amendment in various respects and should not be adopted).

Babette Boliek

Associate Professor of Law
Pepperdine University School of Law

Fred H. Cate

Distinguished Professor and C. Ben Dutton Professor of Law
Indiana University Maurer School of Law

James C. Cooper

Associate Professor of Law and Director, Program on Economics & Privacy
Scalia Law School, George Mason University

Justin (Gus) Hurwitz

Assistant Professor of Law
Nebraska College of Law

Mark A. Jamison

Director and Gunter Professor, Public Utility Research Center
University of Florida

Daniel A. Lyons

Associate Professor of Law
Boston College Law School

Geoffrey A. Manne

Executive Director
International Center for Law & Economics

David W. Opderbeck

Professor of Law, Seton Hall University Law School
Director, Gibbons Institute of Law, Science & Technology

Paul H. Rubin

Samuel Candler Dobbs Professor of Economics
Emory University