



July 11, 2016

The Honorable John Thune
Chairman, Senate Committee on Commerce, Science, & Transportation
511 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Bill Nelson
Ranking Member, Senate Committee on Commerce, Science, & Transportation
716 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Thune and Ranking Member Nelson:

We write to applaud the Committee for your efforts to examine the Federal Communication Commission's ("FCC") proposed broadband privacy rules. Now that the reply comment period in the FCC's proceeding has closed, this hearing is a timely and important venue for considering the deep flaws that we, and many other commenters, have identified in the FCC's lead proposal. In the months since the FCC unveiled its proposed rules, a diverse set of stakeholders has criticized the proposals because they would impose unnecessary costs on consumers, put a drag on innovation and competition, and make it harder for broadband Internet access service providers ("ISPs") to work with the government and third-party partners to ensure the security, reliability, and integrity of the service. The record before the FCC adds depth and breadth to these criticisms and raises additional arguments, including important constitutional concerns. It is clear that the FCC's proposed rules are both inconsistent with consumer expectations and clash with the important policies that have successfully guided the internet economy for almost two decades under both Democratic and Republican administrations.

Title II of the Communications Act in no way requires the FCC to adopt prescriptive privacy rules that would single out one subset of the broader online ecosystem for heightened and inconsistent regulation that ignores the sensitivity of the information at issue. As comments from current and former Federal Trade Commission ("FTC") Commissioners, civil rights organizations, economists, legal scholars, and companies ranging from advertisers to home efficiency companies have noted, the FTC's consumer privacy framework is much better suited for the dynamic, innovative, and highly competitive Internet economy – in which ISPs play an important but limited role. At the center of the FTC's framework and the Obama Administration's reports and legislative proposals is the idea that companies should be transparent with consumers, provide them with choices that are appropriate for the sensitivity of data or use in question, and maintain reasonable data security safeguards.

Consistent with that approach, before the FCC initiated the broadband privacy proceeding, a broad industry coalition of ISPs, tech companies, equipment providers, and others joined together to urge the FCC to adopt a framework based on the broad principles of transparency, respect for context, and choice. The coalition's

proposal, which is attached to this letter, emphasized that “[c]onsumers should have consistent and predictable privacy protections for the information they deem private and sensitive, no matter how or with whom they share it.” In other words, we support privacy protections that address the potential for genuine consumer harm, allow consumers to exercise appropriate control over how information about them is used and shared, and provide the flexibility that is necessary to promote innovation and competition. The FCC’s proposed rules, however, are inconsistent with the flexible framework that the FTC enforces against many other players in the internet economy; and the proposed rules offer no material improvement to consumer privacy protections.

The staff of the FTC’s Bureau of Consumer Protection recently made the same point in their comments to the FCC, noting that creating special rules for ISPs “is not optimal” and that the rigid proposed rules “could hamper beneficial uses of data that consumers may prefer, while failing to protect against practices that are more likely to be unwanted and potentially harmful.” We agree: privacy rules that hamper innovation and competition while also failing to meet consumers’ expectations are “not optimal,” to say the least.

The FCC’s proposed rules are also seriously out of step with the technology-neutral approach – applied to both ISPs and non-ISPs – that has guided the Administration’s many efforts on privacy and cybersecurity policy, with great success. For example, the Administration’s Consumer Privacy Bill of Rights emphasized the importance of common principles that apply across the ecosystem, in particular the need to harmonize the standards that apply to communications companies with the standards that apply to the rest of the Internet economy. The Consumer Privacy Bill of Rights framework provides a “clear statement of basic privacy principles that apply to the commercial world, and a sustained commitment of all stakeholders to address consumer data privacy issues as they arise from advances in technologies and business models.” Similarly, the Administration’s Cybersecurity Framework was “created through collaboration between government and the private sector, uses a common language to address and manage cybersecurity risk in a cost-effective way based on business needs without placing additional regulatory requirements on businesses.” This is the right approach for the innovative, dynamic, competitive internet economy.

The FCC’s proposal to go in a radically different direction also raises serious constitutional concerns. Professor Laurence Tribe, a pre-eminent scholar of the U.S. Constitution, concluded that the “profound mis-matches” between the goals of the FCC proposal and its actual effects if adopted would violate the First Amendment in several ways. According to Professor Tribe, because the proposal “singles out broadband ISPs for extremely burdensome regulation” while leaving a wide range of other participants in the internet economy under different rules, it is the kind of speaker-based restriction that would face strict scrutiny under the First Amendment. Professor Tribe also concluded that the proposal would be unconstitutional even under the more lenient standard that applies to commercial speech. The time-proven effectiveness of the legal standards that the FTC enforces demonstrates that a much less restrictive alternative is available to the FCC.

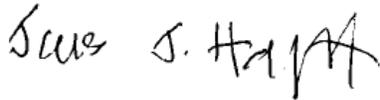
Put simply, the “profound mis-match” between the FCC’s highly restrictive proposal and the surrounding legal, economic, and technological landscape is bad policy and constitutionally problematic.

We appreciate the Committee’s important recognition of this issue and the need for Congressional oversight. We are hopeful that your examination of these issues will lead to an FCC approach that closely harmonizes FCC privacy rules with the existing FTC framework and is consistent with the Administration’s guiding principles for privacy and security in the internet economy. Doing so would protect consumer privacy, minimize consumer confusion resulting from inconsistent regulations, permit new entry into the online advertising market, and provide the flexibility the online marketplace needs in order to continue to innovate and evolve as it has done for many years under such a regime.

Sincerely,



Gary Shapiro
President & CEO
Consumer Technology Association



Jim Halpert
President & CEO
Internet Commerce Coalition



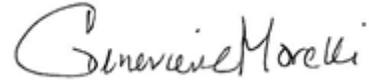
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