

July 12, 2016

The Honorable Greg Walden
Chairman
Subcommittee on Communications
and Technology
Committee on Energy and Commerce
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications
and Technology
Committee on Energy and Commerce
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

We, the undersigned business associations and businesses write to express gratitude for the House Subcommittee on Communications and Technology's oversight hearing of the Federal Communications Commission (FCC) and to voice our concern with the Commission's proposed broadband privacy rule. American e-commerce has thrived under the strong and flexible regulatory framework generally enforced by the Federal Trade Commission (FTC). Although the FCC's proposed rule directly regulates only broadband internet service providers, it threatens the flourishing internet ecosystem by establishing a policy that negatively affects industries beyond broadband providers, departs significantly from well-established norms for privacy regulation, and provides little to no benefit to consumers.

We, the business community, are concerned with the FCC's proposed broadband privacy rule because it creates a new heavy-handed privacy standard that threatens the thriving internet economy. According to the U.S. Department of Commerce, in 2015 web sales totaled approximately \$341.7 billion, accounting for nearly ten percent of all retail sales in the United States.¹ Data-driven marketing led to a \$202 billion revenue increase to the national economy and created nearly 1 million jobs in 2014.² Unfortunately, according to Moody's Investor Services, the FCC's proposed rule poses "a long-term risk to the current TV advertising business model, as well as all broadband providers whom also have ad sales exposure," and could be "credit negative" to internet service providers.³ With online sales and digital advertising acting as a major driving force in the American economy, heavy-handed regulatory frameworks for privacy such as those proposed by the FCC could hamper the thriving internet economy.

¹ Stefany Zaroban, "US e-commerce grows 14.6% in 2015," INTERNETRETAILER (Feb. 17, 2016) available at <https://www.internetretailer.com/2016/02/17/us-e-commerce-grows-146-2015>.

² John Deighton and Peter Johnson, "The Value of Data 2015: Consequences for Insight, Innovation & Efficiency in the U.S. Economy," (2015) available at <http://thedma.org/advocacy/data-driven-marketing-institute/value-of-data/>.

³ David Shepardson, "Update 1-US. FCC Internet privacy proposal could harm broadband providers-Moody's," REUTERS (Mar. 15, 2016) available at <http://www.reuters.com/article/usa-fcc-internet-moodys-idUSL2N16N0UA>.

The FCC's proposed broadband privacy rule generally requires broadband providers to obtain consumer consent to disclose consumer data to unaffiliated third parties, or even to use it for their own purposes.⁴ This policy goes far beyond that which is required for most companies today. This new undue burden on the nation's telecommunications providers will take away critical resources that would otherwise be applied to further investment in the nation's broadband infrastructure on which all industries depend to fuel their innovation pipeline.

Congress has never passed a law specifically targeting broadband providers' privacy and marketing practices, and indeed, the generally-applicable marketing laws on the books, such as CAN-SPAM and Do Not Call, provide for an opt-out regime for companies' use of data for marketing. The proposed rule starkly contrasts with the FTC's model of privacy enforcement and recommendations that requires opt-in only for certain sensitive data or material retroactive changes to their privacy promises.

The data covered by the new FCC privacy proposal goes beyond that of the current FTC framework. The FTC in its staff comments regarding the FCC's proposed broadband rule's definition of "Personally Identifiable Information" (PII) stated that, "the proposal to include any data that is 'linkable' [to an individual, even when a link is not reasonably likely to occur,] could unnecessarily limit the use of data that does not pose a risk to consumers."⁵

In addition to an overbroad definition of PII, the FTC also takes issue with the opt-in approach for data, which is used and disclosed by broadband providers for purposes other than for the customer-business relationship and telecommunications affiliates. The FTC staff comments recognize that the FCC's proposed opt-in "approach does not reflect the different expectations and concerns that consumers have for sensitive and non-sensitive data. As a result it 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."⁶ According to a 2016 Zogby Poll, nearly 85 percent of Americans prefer an ad-supported internet in which most content is free.⁷ A majority of Americans also prefer a mix of online advertising that is not random.⁸ The business community believes that it does not make sense for the Commission to adopt a privacy regime that undermines the internet ecosystem preferred by the vast majority of Americans.

⁴ 81 Fed. Reg 23360, 23405 (April 20, 2016)

⁵ Comment of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission at 9 (May 27, 2016) available at https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-federal-trade-commission-federal-communications-commission/160527fcccomment.pdf.

⁶ *Id.* at 22. Indeed, 83 percent of consumers think personal data should be protected based on its sensitivity, not based on the company that holds the data. See Comment of the Progressive Policy Institute (May 26, 2016), available at <https://ecfsapi.fcc.gov/file/60002077404.pdf>.

⁷ See ZOGBY ANALYTICS PUBLIC OPINION SURVEY ON VALUE OF THE AD-SUPPORTED INTERNET at 5 (May 2016) available at <http://www.aboutads.info/sites/default/files/resource/ZogbyAnalyticsConsumerValueStudy2016.pdf>.

⁸ Grant Gross, "Survey: Internet users like targeted ads, free content," PCWORLD (Apr. 19, 2013) available at <http://www.pcmag.com/article/2035836/survey-internet-users-like-targeted-ads-free-content.html>.

The undersigned business associations and businesses thank you for your oversight of the Commission. We believe the Commission should abandon its current regulatory approach under the NPRM and adopt a privacy framework similar to that of the FTC that would give consumers strong protections. The current proposal institutes a new heavy-handed privacy approach that could undermine the flourishing 21st Century Internet economy.

Sincerely,

Americans for Tax Reform
Consumer Technology Association
CTIA
Digital Liberty
National Association of Manufacturers
National Black Chamber of Commerce
National Cable & Telecommunications Association
NTCA-The Rural Broadband Association
Power and Telephone Supply Company
Static Peak, LLC
U.S. Chamber of Commerce

cc: Members of the Subcommittee on Communications and Technology