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The Net Neutrality CRA Would Remove FTC Privacy Protections

by

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Today, Sen. Edward Markey, D-Mass., is poised to introduce a Congressional Review Act resolution to overturn the Federal Communications Commission's December 2017 Restoring Internet Freedom Order. The resolution, if it ever were adopted by a majority vote in both the Senate and the House and signed by President Trump, would have the perverse effect — among others — of diminishing privacy protection for consumers of Internet.

The Restoring Internet Freedom Order largely repealed the Obama Administration FCC's February 2015 order that, under the superficially appealing guise of "net neutrality," imposed heavy-handed public utility-style regulation on Internet service providers.

Although there may be questions at the margin regarding the reach of what I'll call the "net neutrality CRA," its adoption presumably would reinstate the now vacated Obama-era regulations, including the classification of Internet service providers like Comcast and AT&T as telecommunications carriers rather than information service providers. This classification creates several adverse effects. For example, before they were repealed, the Obama FCC public utility-style regulations had been shown to deter investment by ISPs in building out high-speed

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broadband networks. And they had discouraged the offering of innovative services, such as popular “free data” wireless plans.

But, for present purposes, adoption of the net neutrality CRA would result in another significant adverse effect — one which thus far has received little notice. Adoption would leave consumers with less privacy protection than they now have.

Here’s why.

By changing the classification of ISPs to telecommunications carriers (equivalent to common carriers) from information service providers, the 2015 Obama-era regulations had the effect of eliminating the Federal Trade Commission’s jurisdiction over broadband ISP privacy practices. This is because the FTC lacks authority to regulate telecommunications carriers subject to the FCC’s jurisdiction.

Following the FCC’s 2015 reclassification, in October 2016 the agency adopted stringent new privacy regulations applicable to ISPs, including opt-in requirements, which are not applicable to non-ISPs like web giants Google and Facebook. Even though these web giants collect far more personal data over the Internet than ISPs, they remained subject to the FTC’s considerably less stringent privacy regime.

In light of the confusing asymmetric privacy regulatory approach created by the FCC, Congress passed a Congressional Review Act resolution, signed by President Trump in April 2017, overturning the FCC’s October 2016 privacy regulation.

Then, by once again classifying Internet service providers as information service providers — the classification first adopted in 2002 with the emergence of broadband Internet service providers — rather than telecommunications common carriers, the FCC’s Restoring Internet Freedom Order had the salutary effect of restoring the FTC’s jurisdiction to regulate the privacy practices of both the so-called “edge providers” like Facebook and Google and the ISPs. In other words, presently, a symmetrical privacy regulatory regime is in place, subject to FTC enforcement authority, that protects consumers against privacy abuses of both the edge providers like Facebook and Google and ISPs like AT&T.

But if Congress adopts the net neutrality CRA overturning the Restoring Internet Freedom Order, the effect would be to jettison the FTC’s current symmetrical privacy regulatory regime. The FTC would be divested of authority over the ISPs. Thus, consumers would be left with less privacy protection. And, importantly, under the Congressional Review Act, the FCC would be precluded from adopting a new privacy regulation applicable to ISPs that is “substantially the same” as the one overturned in April 2016.

It may well be, in light of the “Facebook hearings” and heightened concerns about data breaches and misuse of personal information, that Congress will decide legislation is needed to clarify or strengthen existing privacy protections. In the meantime, however, there ought to be little doubt that the privacy protections in place now should be maintained and enforced by the FTC.

That's just one more reason — but a very good one — why Congress should not adopt the net neutrality CRA overturning the Restoring Internet Freedom Order. If members of Congress want to protect consumers, their time will be much better spent considering whether new privacy legislation is needed, rather than reducing the protection that currently exists.

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