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The Right Way to Protect Privacy Throughout the Internet Ecosystem

by

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I. Introduction and Summary

Yesterday the Senate passed a joint resolution pursuant to the Congressional Review Act that disapproved the Federal Communications Commission's privacy rules.¹ These rules, passed during the waning days of the Obama administration, restrict the ability of Internet service providers to collect and use consumer information.² Congressional action comes on the heels of the agency's decision to stay a portion of the rules pending resolution of several motions for reconsideration currently before the agency.³ Along with the stay, Chairman Ajit Pai released a rare joint statement with Federal Trade Commission Acting Chairman Maureen Ohlhausen,⁴ which criticized the FCC for applying a different privacy regime to ISPs than the FTC applies to the rest of the entities throughout Internet ecosystem—themes echoed in the floor debate in Congress.⁵ If the House of Representatives concurs with the joint resolution and the president signs it, the rules will be nullified.

The privacy rules are precisely the type of agency overreach that the Congressional Review Act was designed to rein in. Born as an unintended consequence of the FCC's ill-advised reclassification order, the privacy order unnecessarily disadvantages ISPs in the competition for the digital advertising dollars that drive the Internet economy. ISPs are singled out for a greater regulatory burden not because they pose a greater threat to consumer privacy, but rather because

they happen to be subject to FCC regulation while edge providers such as Google and Facebook are not. This disparate treatment is doubly problematic given that edge providers, not ISPs, dominate the digital advertising space, and the burden placed on ISPs achieves little, if any, measurable benefit to consumer privacy. Whether the joint resolution succeeds or fails, the FCC should, as an interim step, level the playing field by following Chairman Pai's plan to mirror the FTC's rules. Then, as soon as feasible, the agency should remove the root problem by repealing its reclassification decision and working with Congress to restore the FTC's complete jurisdiction over American privacy law.

II. The FCC's Problematic Privacy Rules

If successful, the joint resolution would mark only the fifth time ever that an agency rule was revoked under the Congressional Review Act.⁶ While this debacle is embarrassing for the agency, it is largely a self-inflicted wound. The FCC privacy saga began as an unintended consequence of the agency's 2015 capitulation to the demand by pro-regulatory forces for "strong" net neutrality rules. In its *Open Internet* order, the FCC reclassified broadband providers as common carriers under Title II of the Communications Act, as a vehicle by which to secure the ban on paid prioritization that President Obama and various interest groups sought.⁷ In doing so, the agency eschewed the less intrusive roadmap proposed by the D.C. Circuit⁸ and ignored an eleventh-hour statutory compromise offered by congressional Republicans that would have accomplished the agency's goals without reclassification.⁹ Undiscussed in the order is the effect reclassification would have on the FTC, whose regulatory authority under Section 5 of the Federal Trade Commission Act does not extend to common carriers.¹⁰ The FTC had long used its Section 5 authority to build a robust and comprehensive regime to protect consumer privacy, both offline and online. The FCC's rash reclassification decision stripped the FTC of jurisdiction to enforce the law against broadband providers, leaving a legal gap.

The agency compounded this mistake by the way it chose to fill that gap. Broadband providers recognized that some agency action was appropriate to eliminate this legal vacuum, and comments filed before the agency showed broad support for FCC rules that would mirror the FTC's "opt-out" approach to consumer privacy. Under this approach, companies must provide consumers notice of what data is collected and how it is to be used, and the option to opt out of data collection if the consumer so chooses.¹¹ But the FCC eschewed this traditional model in favor of a more stringent "opt-in" model. Specifically, broadband Internet providers were prohibited from collecting and using information about a consumer's browsing history, app usage, or geolocation data without permission—all of which edge providers such as Google or Facebook are free to collect under FTC policies.¹²

As Michael Horney noted in an earlier Free State Foundation Perspectives release,¹³ these restrictions create barriers for ISPs to compete in digital advertising markets. With access to consumer information, companies can provide more targeted advertising, ads that are more likely to be relevant to the consumer and therefore more valuable to the advertiser. The opt-in requirement means that ISPs will have access to less information about customers than Google, Facebook, and other edge providers that fall under the FTC's purview—meaning ISPs cannot serve advertisers as effectively as the edge providers with whom they compete. This disadvantage is doubly problematic when one realizes that edge providers, not ISPs, currently

dominate the digital advertising market. A recent study estimates that Google collected over half of all U.S. digital advertising in the first half of 2016, and Facebook represented another 17 percent.¹⁴ ISPs such as AT&T and Verizon are relative latecomers to this market. By restricting their access to consumer information, the FCC is making it harder for these insurgents to challenge incumbents, and is therefore reinforcing the dominance of a duopoly that commands over two-thirds of the market.

Some including the FCC have suggested that a higher privacy standard for ISPs is appropriate because ISPs “sit at a privileged place in the network” and can collect “an unprecedented breadth of electronic personal information.”¹⁵ But this argument rings hollow. First, it is not clear that ISPs are in a position to learn more about a consumer than leading edge providers. Google not only processes roughly two-thirds of all U.S. Internet searches,¹⁶ it also runs the operating system on over half of all U.S. smartphones.¹⁷ Both Google and Facebook permit other content providers to use their logins for identity verification, allowing these titans to build a consumer profile across platforms and locations. My broadband provider may know my online behavior while at home, but Google and Facebook can build a more complete profile of my activity while at home, at work, and on mobile networks as well. Moreover, as Professor Christopher Yoo (who is also a member of the Free State Foundation Board of Academic Advisors) has observed, there is very little an ISP can determine from its allegedly “privileged position” on the network. Whereas edge providers can see all content the consumer accesses, ISPs can only see metadata and traffic flow (unless they engage in deep packet inspection, which is legally suspect under the Electronic Communications Privacy Act).¹⁸

For these reasons, Chairman Pai is correct to call for a revisiting of the privacy rules. The Commission should level the playing field by making sure all players are governed by the same rules. This would avoid the prospect of the government picking winners and losers in the digital advertising market.

III. The Difficulties with an Opt-In Rule

Of course, the argument that the playing field should be level does not answer the question whether to level down or level up. Although the FCC’s rules focused primarily on ISPs, at times the order seemed to endorse an opt-in model as the preferable standard throughout the Internet ecosystem. This is the position recently taken by Gigi Sohn, who served as special assistant to then-Chairman Tom Wheeler during the FCC privacy debate.¹⁹ From this perspective, the FCC adopted opt-in rules in part as a way for the agency to nudge the FTC to adopt similar opt-in rules generally, including in markets where the FCC has no expertise or authority to regulate.

As an initial matter, it’s worth noting that a shift to opt-in rules does little, if anything, to empower consumers. It’s not as if the FTC opt-out regime allows companies to use consumer data surreptitiously or against the consumer’s will. Both approaches require companies to notify consumers of what information is being collected about them and how it could potentially be used. Both approaches give consumers a choice about whether the company can use their personal data. Under either model, the consumer has ultimate decisionmaking authority over whether and how his or her information will be used. The primary difference is the default rule: if the consumer fails express a preference, is the company free to collect and use information or

not? Thus, the additional burden to consumers of an opt-out rule is minimal. If a consumer does not wish his or her information to be collected, that consumer simply must notify the company.

But while the difference between opt-out and opt-in rules is not especially significant for consumers, it can potentially be devastating to the companies that comprise the Internet economy, depending on how the consent is secured. To understand why, one must recognize that Internet privacy cannot be considered in a vacuum. Rather, choosing the proper privacy rule requires an appreciation of the role that consumer information plays online.

Simply put, consumer information is the lifeblood of the Internet. It is the packaging of consumer information into advertising bundles that allows companies like Google to offer the “free” services that consumers have come to expect from the Internet experience, such as search results, email use and storage, and YouTube access. Shifting from opt-out to opt-in dries up the pool of information available for monetization, by removing any information from a consumer that does not make his or her consent known. With less information available, these companies will have fewer advertising dollars with which to subsidize their consumer-facing services. At the margin, this could lead companies to charge for services like gmail that they currently offer for free. And, importantly, a shift to a fee-based access model risks widening the digital divide, by putting Internet-based services beyond the reach of those who cannot or will not pay for them.

Moreover, contrary to the FCC’s findings, an opt-out regime may be more efficient than opt-in. Michael Horney cites a 2000 paper by Fred Cate and Michael Staten, in which the authors argue that “opt-in is more costly precisely because it fails to harness the efficiency of having customers reveal their own preference as opposed to having to explicitly ask them.”²⁰ Opt-in requires companies to expend effort asking each and every customer for permission, and then maintain a record of each consent in case of a future dispute. An opt-out rule shifts the burden onto consumers, meaning the company needs only communicate with and document those consumers who object—thus freeing resources for other endeavors. Moreover, by setting the default rule to “no permission,” an opt-in regime risks barring advertisers from using information from those consumers who in fact do not object to its use, but who for whatever reason fail to make that known to the company, which creates inefficiency.

IV. Short-Term and Long-Term Solutions

Having laid bare the problems with the FCC’s current unlevel playing field and with the opt-in model generally, the question becomes how to solve the current dilemma. If the joint resolution passes the House and is signed by the president, the existing rules will be revoked.²¹ Should the resolution fail, the FCC nonetheless may repeal the rules by granting the various motions for reconsideration currently pending before the agency. Either decision will expose anew the privacy gap created by the reclassification decision that initially prompted the rules.

But this temporary circumstance is not as problematic as it may seem. First, that gap existed for well over a year after the March 2015 reclassification decision took effect—yet there were no major complaints about ISP treatment of consumer information during this period, largely because most ISPs have adopted voluntary data management practices even in the absence of administrative oversight. Second, repeal is the necessary first step for the agency to restore

regulatory symmetry in this area. In their joint statement, Chairmen Pai and Ohlhausen endorsed a “comprehensive and consistent” framework for privacy issues.²² Specifically, they committed to “harmonizing the FCC’s privacy rules for broadband providers with the FTC’s standards for other companies in the digital economy.” While some critics have asserted that the joint resolution would prohibit the FCC from considering a new privacy order, that is incorrect. The Congressional Review Act prohibits the agency from reissuing a rule “in substantially the same form” as the rejected rule or issuing “a new rule that is substantially the same as such a rule.”²³ A new, different order that ties FCC enforcement to existing FTC standards would not be “substantially the same” as the current rule, as it would adopt an opt-out rather than an opt-in rule and would unify rather than bifurcate privacy law. Thus assuming the joint resolution passes, the FCC remains free to enact interim measures that could fill the prospective legal gap without creating regulatory asymmetry.

As soon as feasible, the FCC should move toward restoring the FTC’s jurisdiction over broadband providers. This must start with a repeal of its ill-advised decision to reclassify broadband providers as Title II common carriers. To the extent there is a claimed privacy gap, it is only one of many unintended consequences of the reclassification decision. These difficulties are unsurprising: as Free State Foundation scholars often have noted, much of Title II was written in the 1930s to discipline the Bell Telephone monopoly. Trying to adapt it to today’s competitive Internet marketplace is like trying to fit a square peg in a round hole (with only the tool of forbearance to try to shave off the sharp corners). Repeal of Title II reclassification would strip broadband providers of the “common carrier” designation and would thus restore the authority the FTC had to regulate broadband privacy prior to 2015.

There is, however, one potential wrinkle in this repeal-and-restore plan. Late last year, the Ninth Circuit Court of Appeals decided *FTC v. AT&T Mobility*, which found a somewhat surprising additional limitation on the FTC’s Section 5 authority.²⁴ That case involved AT&T’s challenge to a fine leveled by the FTC pursuant to its Section 5 authority for the company’s failure to disclose its data-throttling practices during the period before Title II reclassification. The FTC argued that the fine was appropriate because before reclassification, data services were not common carrier services and so the limitation on Section 5 was inapposite. The Court, however, sided with AT&T, holding that the Section 5 “common carrier” exemption was status-based, not activity-based. In other words, if a company acts as a common carrier in some capacity, it is exempt from Section 5 authority even if the activity giving rise to liability is not itself a common carrier activity. Because AT&T operated a traditional telephone company (which unquestionably offered Title II common carriage service), the court said the company was exempt even though the conduct at issue had little to do with the company’s common carrier activities.

FTC v. AT&T Mobility therefore suggests that if Title II reclassification were to be repealed, this would still leave a gap because the FTC would be unable to use Section 5 to regulate the privacy practices of any broadband provider (such as AT&T Mobility) that also operates a different common carriage business. But this is not as significant a challenge as it appears at first glance, for several reasons:

First, the Ninth Circuit decision has not yet become final. The FTC has filed a petition for rehearing *en banc*. The court ordered AT&T to file a response to the

petition, and also granted leave for numerous parties to file *amicus curiae* briefs in the case, many of which urged reversal. The court may take the case *en banc* and reverse it, and even if it does not, the FTC can still seek Supreme Court review. (I will admit that I was skeptical when I first heard of the panel's decision, but upon reading the opinion in full, there are surprisingly strong arguments in favor of the panel's conclusion that Congress intended the exemption to be status-based rather than activity-based.)

Second, even if the decision is affirmed, that does not mean that repeal of reclassification will leave all broadband providers free of privacy regulation. The only companies that would escape FTC authority would be those that also happen to operate a common carrier business—to wit, landline and wireless telephone companies. Cable companies, which comprise America's two largest broadband providers and 60% of the market nationwide,²⁵ would fall squarely under the FTC's umbrella, as would standalone broadband providers. Thus, while repeal might not bring all broadband providers within the FTC's jurisdiction, it will restore FTC authority over most.

Third, it is unclear how future courts will limit this status-based exemption. As Public Knowledge's Harold Feld notes, it cannot be correct that any company, no matter how large, can add a small rural telephone company to its portfolio and thus escape the FTC's Section 5 authority entirely.²⁶ I agree with Feld that Google cannot credibly argue that its \$89.5 billion empire is completely exempt from FTC Section 5 regulation because it owns Google Fiber with about 50,000 subscribers within its portfolio of businesses.²⁷ Future courts will likely determine that at least some companies are subject to Section 5 regulation despite also operating a common carrier business—though just they will define the line separating exempt from non-exempt entities is not yet clear.

More generally, the potential for a gap in FTC jurisdiction is not sufficient to justify continuing to classify broadband providers as common carriers. This argument, that the FCC should classify broadband providers under Title II to correct a problem with the FTC Act, commits the same error that underlay the net neutrality proceeding. The question of how to classify broadband providers under the Communications Act should start—and end—by asking what Congress intended. It is not a goal-seeking exercise to see which classification yields one's preferred policy result. The consequences should flow from the classification decision, not the other way around.

If the FTC Act's common carrier exemption creates a regulatory gap, as the Ninth Circuit decision suggests, then it is up to Congress, not the FCC, to fix it. Congress can act to limit or repeal Section 5's common carrier exemption. As Feld notes, the exemption was created at a time when most common carriers had an agency that comprehensively regulated their operations, and therefore FTC oversight was at best redundant and potentially harmful to industry-specific regulatory schemes. Following the advent of competition and deregulation of those industries (at least to some extent in some instances), that rationale is somewhat suspect. If the Ninth Circuit is right that Section 5 exempts common carriers generally, the gap thus exposed goes far beyond

privacy law to include all actions the FTC takes under Section 5. And it similarly goes beyond telecommunications providers, to encompass other common carriers such as airlines, railroads, bus services, and several other industries. No matter how much the FCC twists the language of Title II, it cannot stretch it enough to close the Section 5 gap completely. That problem can only be solved by Congress—but the FCC can help by signaling its support for this change and assuring the Congress that it is unconcerned about the potential interagency rivalry that initially spawned the common carrier exemption.

Conclusion

The privacy rules reflect some of the worst agency tendencies toward administrative overreach. Having manufactured a “gap” in privacy law as an unintended consequence of its quixotic pursuit of rigid net neutrality regulation, the FCC then took advantage of the “opportunity” thus presented to call into question the FTC’s expertise and to try to influence privacy norms throughout the Internet ecosystem. In doing so, the FCC went far beyond its statutory mandate. By doing so it entrenched incumbent edge providers and hobbled the efforts of insurgent ISPs to compete against them, without improving consumer privacy in any significant way.

I applaud the Senate’s effort to repeal these rules and urge the House and the president to follow suit. Repeal would rein in this overreach and mark an important first step toward restoring the competitive balance between ISPs and edge providers. As an interim measure, the FCC should enact new rules that mirror existing FTC practices. Then, as soon as feasible, the Commission should repeal its ill-advised Title II reclassification decision and return privacy jurisdiction back to the FTC, where it belongs. Consumer privacy rules should apply equally to all companies regardless of the role they play in the Internet ecosystem, and they should be subject to oversight by a regulator with a clear view of how privacy interests affect that ecosystem as a whole.

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¹ S.J. Res. 34, 115th Congress (2017).

² Protecting the Privacy of Consumers of Broadband and other Telecommunications Services, Report and Order, FCC No. 16-148 (Nov. 2, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf.

³ Protecting the Privacy of Consumers of Broadband and other Telecommunications Services, Order Granting Stay in Part, WC Docket No. 16-106 (Mar. 1, 2017), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/FCC-17-19A1.pdf.

⁴ Joint Statement of FCC Chairman Ajit Pai and Acting FTC Chairman Maureen K. Ohlhausen on Protecting Americans’ Online Privacy, March 1, 2017, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/DOC-343702A1.pdf.

⁵ FCC Commissioner Mignon Clyburn and FTC Commissioner Terrell McSweeney issued a similar joint statement criticizing the stay. See Joint Statement of FCC Commissioner Mignon Clyburn and FTC Commissioner Terrell McSweeney on Indefinite Suspension of Data Security Rules, Feb. 24, 2017, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0224/DOC-343629A1.pdf.

⁶ Importantly, all but one of those have come in the last two months as the Trump administration has targeted last-minute Obama administration rules. As of today's date, there are seven other joint resolutions that have passed both houses and are awaiting the president's approval or veto.

⁷ Protecting and Promoting the Open Internet, GN Docket No. 14-28 (Mar. 12, 2015).

⁸ Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

⁹ See Larry Downes, Eight Reasons to Support Congress's Net Neutrality Bill, Washington Post, Jan. 20, 2015, available at https://www.washingtonpost.com/news/innovations/wp/2015/01/20/eight-reasons-to-support-congress-net-neutrality-bill/?utm_term=.a34f5c42222c.

¹⁰ 15 U.S.C. § 45(a)(2).

¹¹ Congress has adopted a stricter opt-in model for certain sensitive categories of data, most notably health information (via HIPPA), financial information (via the Gramm-Leach-Bliley Act), and information about children (via COPPA).

¹² See Report and Order, supra note 2, at ¶167. Consistent with FTC practice, the FCC also required opt-in treatment for use of health, financial, and children's records, which were less controversial.

¹³ See Michael J. Horney, FCC Privacy Rules Would Harm Consumers by Creating Barriers for ISP Advertising, 11 FSF Perspectives 28 (2016).

¹⁴ See Peter Kafka, Google and Facebook are booming. Is the rest of the digital ad business shrinking? Recode, Nov. 2, 2016, available at <http://www.recode.net/2016/11/2/13497376/google-facebook-advertising-shrinking-iab-dcn>.

¹⁵ See Report and Order, supra note 2, at ¶28.

¹⁶ See comScore Explicit Core Search Share Report, February 2016, available at <https://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings>.

¹⁷ comScore Reports January 2016 U.S. Smartphone Subscriber Market Share, available at <https://www.comscore.com/Insights/Rankings/comScore-Reports-January-2016-US-Smartphone-Subscriber-Market-Share>.

¹⁸ See The Fate of the FCC's Privacy Rule: A Chat with Professor Christopher Yoo, Forbes Washington Bytes Blog, Feb. 9, 2017, available at <https://www.forbes.com/sites/washingtonbytes/2017/02/09/the-fate-of-the-fccs-privacy-rule-a-chat-with-law-professor-christopher-yoo/#634fb5433180>.

¹⁹ Gigi Sohn, FCC, FTC Are Playing a Shell Game with Online Privacy, The Hill, Mar. 18, 2017, available at <http://thehill.com/blogs/pundits-blog/technology/324520-fcc-ftc-are-playing-a-shell-game-with-online-privacy>.

²⁰ Fred Cate and Michael Staten, Protecting Privacy in the New Millennium: The Fallacy of 'Opt-In', available at <http://home.uchicago.edu/~mferzige/fallacyofoptin.pdf>.

²¹ See 5 U.S.C. § 801.

²² See Joint Statement, supra note 4.

²³ 5 U.S.C. § 801.

²⁴ FTC v. AT&T Mobility, Inc., 835 F.3d 993 (9th Cir. 2016).

²⁵ See Press Release, 27 Million Added Broadband from Top Providers in 2016, Leichtman Research Group, Mar. 17, 2017, available at <http://www.leichtmanresearch.com/press/031717release.html>.

²⁶ Harold Feld, Ninth Circuit Knee-Caps Federal Trade Commission. Or, "You Know Nothing, Josh Wright." Tales of the Sausage Factory Blog, Aug. 31, 2016, available at <http://www.wetmachine.com/tales-of-the-sausage-factory/ninth-circuit-knee-caps-federal-trade-commission-or-you-know-nothing-josh-wright/>.

²⁷ *Id.*