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**A Blueprint for Trump Communications Reform: Unnecessary Regulations
Should Be Switched Off**

by

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During his campaign, Donald Trump consistently decried excessive, overly intrusive regulation, promising to reduce the government's regulatory reach, which grew so much during President Obama's two terms. Now, the president-elect's transition website proclaims that regulatory reform will be a "cornerstone of the Trump Administration," with the effort including "a temporary moratorium on all new regulation, canceling overarching executive orders and a thorough review to identify and eliminate unnecessary regulations that kill jobs and bloat government."

In this endeavor Mr. Trump should have a willing Congress. House Speaker Paul Ryan's "A Better Way" plan proclaims: "We need to take a smart approach that cuts down on needless regulations while making the rules we do need more efficient and effective."

No doubt the Senate, with its new Republican majority and several regulatory reform bills already drafted and ready to go, will be on board, too.

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Surely, there is no shortage of inviting reform targets among vast number of existing federal regulations — and among the dozens of agencies that administer and enforce the regulations. But here I want to focus only on the Federal Communications Commission (FCC). It's undeniable that the Obama administration's FCC has been on a regulatory binge, adopting a number of major overly burdensome and unduly costly new rules, despite the lack of evidence of market failure or consumer harm.

A notorious example: The FCC's so-called "net neutrality" regulation, adopted in 2015, which, in effect, converted internet service providers into traditional public utilities. The regulation is aimed at treating all internet traffic equally. This may sound superficially appealing in theory, but the rule is fundamentally flawed. On the one hand, it is too rigidly absolutist in banning all forms of paid prioritization of internet traffic. Consumers, rationally, may prefer that some forms of high-volume traffic be prioritized as long as those who benefit pay more for such prioritization, thereby reducing the price low-volume traffic is required to pay. But the FCC's mandate prevents all experimentation with such plans, even though they are common in many other delivery markets.

On the other hand, another component of the net neutrality regulation is too indeterminate. It incorporates a "good conduct" mandate that prohibits any internet service provider from "unreasonably interfering" or "unreasonably disadvantaging" others in the internet ecosystem. In a dynamic marketplace, these vague terms don't establish clear rules of the road. Rather, they confer virtually unbridled enforcement discretion on unelected bureaucrats, as the commission itself conceded when it admitted that the good conduct rule is simply a "catch-all standard." Popular consumer-friendly "free data" plans like T-Mobile's "Binge On" and "Music Freedom" offerings, and other similar plans, already are under investigation by the FCC as it considers whether they comport with the agency's "good conduct" rule. Certainly, the mere existence of the agency's investigation into these free data plans or others has a chilling effect as service providers weigh whether to risk offering other innovative plans that might be popular with consumers.

There are many other examples of the FCC's regulatory overreach, but here's a backward-looking proposal still on the table. The commission is proposing to require the development of a new government-designed "open standard" set-top TV box, or TV navigation device, even as the video marketplace is undergoing rapid change toward increasingly abundant consumer viewing choices. And even as video providers are making available their content through an array of rapidly proliferating online video services, streaming video devices, gaming consoles and smart TVs.

Now that consumers can choose to access video content from among a multitude of services and devices such as Hulu, Amazon Fire TV, Google Chromecast, Roku, PlayStation4 and so forth, here comes the FCC proposing to have a government committee design a new navigation device. Among many other problems, the FCC's "open standard" proposal jeopardizes copyright protection and likely would lead to an increase in pirated video programming.

In short, the FCC has continued regulating communications service providers and media companies as though we were still living in the analog age of Ma Bell and only three TV networks. But today most segments of the communications marketplace are competitive. While marketplace competition may not be ubiquitous, it is the norm.

To comport with digital-age marketplace realities, communications law and policy — and the FCC — need meaningful reform.

Here are some of the most important measures that should undergird a fundamental reform effort, some of which need congressional action, others of which could be accomplished by a reform-minded agency:

- In the existing Communications Act, a significant amount of the FCC’s regulatory activity is undertaken under a delegation of authority to act in the “public interest.” In most instances, the indeterminate public interest standard needs to be replaced with a marketplace competition standard.
- Any new regulations should be required to be justified by clear and convincing evidence of a market failure or consumer harm and a proper cost-benefit analysis. This “clear and convincing” evidentiary standard will reverse the FCC’s current pro-regulatory default presumption. Existing regulations should be reviewed under the same standard and eliminated or modified as appropriate.
- All significant regulations should “sunset” after five years unless the FCC determines, by clear and convincing evidence, that the rules should be retained.
- The FCC’s merger review process should be changed so the agency doesn’t duplicate the work of the antitrust authorities. The commission’s role should be limited to determining whether, if the proposed merger is approved, the new entity will be in compliance with all existing communications laws and regulations.

Of course, drilling down further, there are many other specific reforms of communications policy that ought to be considered in connection with the “macro” reforms I have suggested. But as the process of rethinking communications policy, and the FCC’s role in implementing it, begins in earnest, the fundamental reforms outlined above are a good place to start.

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