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OF THE
UNITED STATES OF AMERICA

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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

**Re: Comments in Support of Petitions for Reconsideration in the Matter of
Protecting the Privacy of Customers of Broadband and Other
Telecommunications Services (WC Docket No. 16-106)**

Dear Ms. Dortch:

The U.S. Chamber of Commerce (“Chamber”), the world’s largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system, respectfully submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in response to its Notice of Petitions for Reconsideration¹ in the above-referenced proceeding concerning its final broadband privacy rule (“broadband privacy rule”) published in the *Federal Register* on December 2, 2016.²

The Chamber applauds the Commission’s decision to stay, pending the outcome of the above-referenced petitions for reconsideration, the overly-burdensome cybersecurity requirements imposed on broadband providers.³

As explained below, the Chamber opposes the final broadband privacy rule because it is unnecessary, exceeds statutory authority, furthers a regulatory digital divide between edge and telecommunications providers, and threatens innovation by stifling the already thriving Internet ecosystem.

¹ See 82 Fed. Reg. 10999 (Feb. 17, 2017).

² See 81 Fed. Reg. 87274 (Dec. 2, 2016).

³ See Order Granting Stay Petition (Mar. 1, 2017) *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/FCC-17-19A1.pdf.

I. Current broadband provider privacy practices and the market do not justify the final rule

During the notice and comment period during the broadband privacy rulemaking, the Commission questioned whether consumers of Internet service would be hesitant to purchase broadband, without the protections of Section 222 of the Communications Act, and whether such hesitation would lead to a reduction in competition and innovation in the marketplace.⁴

In 2005, the Federal Communications Commission deregulated and reclassified DSL broadband service as an information service.⁵ Since that time, the Federal Trade Commission (“FTC”) solely retained jurisdiction to regulate the privacy practices of broadband providers—all without the application of Section 222.

The facts are clear that the FTC’s light-touch approach to broadband privacy did not inhibit customers from using broadband. In fact broadband usage thrived since the 2005 deregulation of DSL. From 2005 to 2013, according to the Pew Research Center, the percentage of American adults with Internet connections at home grew from 33 percent to 70 percent.⁶ In virtually all parts of the United States, consumers have access to at least two broadband providers.⁷ Consumers continue to utilize wireless broadband on a record pace of 9.65 trillion megabytes in 2015—an increase from 388 billion megabytes in 2010.⁸ The demand for broadband from 2006 to 2014, led to an average of approximately \$70 billion in annual capital expenditures by broadband providers.⁹

Not only has broadband thrived under the light-touch regulatory approach to broadband privacy, privacy issues are not significantly affecting consumer behavior with regard to Internet usage. According to the National Telecommunications & Information Administration’s (“NTIA”) 2014 *Exploring the Digital Nation* report, only **one percent** of American households expressed that privacy was their main concern when deciding not to use the Internet at home.¹⁰ Similarly, in the wireless context, a 2015 Pew Research Center survey revealed the number of

⁴ 81 Fed. Reg. 23360, 23362 (Apr. 20, 2016).

⁵ Margeurite Reardon, “FCC changes DSL classification,” CNET (December 11, 2005) available at <http://www.cnet.com/news/fcc-changes-dsl-classification/>.

⁶ Pew Research Center, *Broadband Technology Fact Sheet* (Dec. 27, 2013) available at <http://www.pewinternet.org/fact-sheets/broadband-technology-fact-sheet/>.

⁷ Robert Litan, “Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens,” BROOKINGS at 2 (June 2004) available at http://www.brookings.edu/~media/research/files/papers/2014/06/regulating_internet_access_public_utility_litan/regulating_internet_access_public_utility_litan.pdf.

⁸ CTIA-The Wireless Association, *Annual Wireless Industry Survey*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey>.

⁹ US Telecom, *Broadband Investment*, available at <https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>.

¹⁰ National Telecommunications and Information Administration, *Exploring the Digital Nation: Embracing the Mobile Internet* at 37 (October 2014) available at https://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_embracing_the_mobile_internet_1016_2014.pdf.

Americans who claimed that privacy and tracking were the main reason for not owning a smartphone was below one percent.¹¹

Consumers may find that privacy is not one of their priorities in determining Internet use because the broadband industry already provided consumers with meaningful privacy protections prior to the rulemaking. According to a report by the Information Technology & Innovation Foundation,¹²

All five of the top broadband providers—Time Warner, Charter, Comcast, Century Link, Verizon, and AT&T—list what types of data they gather are “personally identifiable information” and what is [Consumer Proprietary Network Information] CPNI, distinguishing between these types and aggregated or anonymous data. Each of their privacy policies also...describe why the information is collected. Most importantly, each privacy policy allows subscribers to opt out of 3rd party online advertising, and almost every policy explicitly states that users have the ability to opt out of all personal information and CPNI associated marketing.

Since deregulation of DSL, broadband usage has flourished with a massive increase in usage as well as investment. Given the protections that broadband providers already give consumers, the vast majority of consumers do not place privacy as a priority when determining whether to purchase broadband. For these reasons, the current broadband market and practices do not justify the current rulemaking.

II. The Commission is engaging in a regulatory overreach with its final rule

Notwithstanding the Chamber’s previous assertions that the Commission inappropriately classified broadband providers as Title II common carriers, the broadband privacy rule is also another FCC regulatory overreach. The final rule seeks to make policy decisions with respect to requiring prior permission for data usage and disclosure, the expansion of covered personal data, cybersecurity, and data breach that are best left to Congress.

When Congress passed the 1996 Telecommunications Act, broadband service providers did not exist. Congress granted the Commission authority in the Telecommunications Act to regulate the privacy of “consumer proprietary network information” (“CPNI”) under Section 222 of the Communications Act in the voice telephony context. Other sections of the Telecommunications Act explicitly referred to the Internet but Section 222 of the Communications Act did not.¹³ It is not until 2008 did Section 222 include a carve-out for

¹¹ John Horrigan and Maeve Duggan, “Home Broadband 2015: The Share of Americans with broadband at home has plateaued and more rely only on their smartphones for online access,” PEW RESEARCH CENTER at 27 (Dec. 21, 2015) available at <http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf>.

¹² Doug Brake, Daniel Castro, and Alan McQuinn, *Broadband Privacy: The Folly of Sector-Specific Regulation*, ITIF at 7 (Mar. 2016) available at <https://itif.org/publications/2016/03/01/broadband-privacy-folly-sector-specific-rules>.

¹³ See e.g. Telecommunications Act of 1996, Pub. L. 104-104 §§ 509, 702 (Feb 8. 1996).

Internet Protocol-enabled voice service for emergency purposes.¹⁴ Congress explained that it added this carve-out because Section 222 applied to only wireless and wireline telephony.¹⁵

The Commission also has undertaken a massive expansion by adopting the broadband privacy rule, absent Congressional authorization, of the type of customer information that may be regulated by the FCC with regard to privacy. Section 222 of the Communications Act authorizes the Commission to regulate “Customer Proprietary Network Information” (“CPNI”).¹⁶ Section 222 only defines CPNI as “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service” and “the information contained in the bills pertaining to telephone exchange service or telephone toll service....”¹⁷

The broadband privacy rule creates a new category of protected data called “Customer Proprietary Information” (“CPI”) which includes both CPNI, “Personally Identifiable Information” (“PII”), and the content of communications.¹⁸ The rule defines PII as “any information that is linked or reasonably linkable to an individual.”¹⁹ The Commission’s decision to regulate CPI vastly expands the amount of data covered by Section 222. In spite of the specific categories of data that Congress explicitly authorized the FCC to regulate, the Commission unilaterally has taken upon itself the authority to regulate nearly all data derived from internet usage.

Congress chose to draft section 222 differently from other privacy laws that protect “personal information” and “personally identifiable information.” In other telecommunications laws, such as the Cable Communications Policy Act of 1984 and the Satellite Home Viewer and Reauthorization Act of 2004, Congress specifically granted the Commission the authority to regulate cable and satellite privacy practices regarding PII in the cable and satellite television context.²⁰ Congress could have chosen to explicitly authorize the Commission to regulate PII, like it did for cable and satellite providers under Section, 222 but it did not.

The Commission has clearly exceeded its statutory authority by utilizing Section 222 to regulate broadband providers and by creating an entirely new and overly-expansive category of customer information to regulate.

III. The Broadband Privacy Rule furthers a regulatory digital divide

The broadband privacy rule creates regulatory imbalance in which broadband service providers will be subject to highly-restrictive and prescriptive “opt-in” privacy regulations while other content and edge providers—like Netflix—remain under the light-touch regulatory

¹⁴ See New and Emerging Technologies 911 Improvements Act of 2008. Pub. L. 110-283, § 301 (July 23, 2008).

¹⁵ See 911 Modernization and Public Safety Act of 2007, 110th Cong. 1st Sess., S. Rpt. 110-442, Nov. 13, 2007.

¹⁶ See 47 U.S.C. § 222(h)(1).

¹⁷ *Id.*

¹⁸ 81 Fed. Reg. 87274, 87275.

¹⁹ *Id.* at 87343.

²⁰ See 47 U.S.C. §§ 338(i); 551.

framework of the FTC. The same customer data about Internet usage will be regulated by two very different agencies.

Content and edge providers will continue to operate under FTC's jurisdiction to regulate "unfair and deceptive" trade practices under Section 5 of the Federal Trade Commission Act.²¹ Under Section 5, in the case of unfair and deceptive trade practice violations, the FTC generally issues a cease and desist order that does not immediately impose penalties on alleged violators.²² This practice gives companies notice and a chance to clean up their act. Conversely, broadband providers under section 222 would not be entitled to a notice to correct mistakes and would be subject to the highly-prescriptive regulations imposed by the final broadband privacy rule.

The decision to regulate broadband providers under two different regulatory regimes is entirely arbitrary. According to President Clinton's chief privacy counsel, "The 10 leading ad-selling companies earn over 70 percent of online advertising dollars, and none of them has gained this position based on its role as an ISP."²³ Broadband providers "have neither comprehensive nor unique access to information about users' online activity."²⁴

The Chamber strongly supports voluntary self-regulation as the appropriate mechanism for online data protection. FTC Commissioner Maureen Olhausen noted that "[t]he online and mobile landscape changes quickly, and those who understand it best are the companies who are using new technologies to advance customer value. Self-regulation allows consumers as well as industry members to benefit from these advances without unintentionally slowing the pace of innovation."²⁵

An example of successful and functioning self-regulation for privacy practices is the Digital Advertising Alliance's ("DAA") mobile application guidelines. The DAA, a private entity, established principles with regard to choice and transparency regarding data collected by mobile apps.²⁶ Data analytics and advertising companies who are DAA participants must affirmatively and publicly adopt the principles and guidelines established and many times require third parties with whom they negotiate to follow them as well.²⁷ Entities that fail to live up to their publicly affirmed privacy policies are already subject to enforcement actions by the FTC for Section 5 violations.

²¹ See 15 U.S.C. § 45.

²² *Id.* at § 45(b).

²³ Testimony of FCC Commissioner Ajit Pai before the Subcommittee on Privacy, Technology and the Law, *Examining the Proposed FCC Privacy Rules* at 2 (May 11, 2016) (citing Peter Swire, "Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others" at 9 (Feb. 29, 2016) available at <http://www.iisp.gatech.edu/working-paper-online-privacy-and-isps>).

²⁴ *Id.*

²⁵ Commissioner Maureen K. Olhausen Speech to the BBB Self-Regulation Conference, *Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era* (June 24, 2014) available at https://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbself-regulation.pdf.

²⁶ "DAA Issues Inaugural Enforcement Action for Compliance with Mobile App Guidelines," LEXOLOGY (May 9, 2016) available at <http://www.lexology.com/library/detail.aspx?g=c381603f-9f42-4cac-a7c3-22e080338cf8>.

²⁷ *Id.*

During the broadband privacy rulemaking period, the FTC submitted staff comments recommending that the FCC adopt the Federal Trade Commission's privacy approach by only requiring opt-in consent for "sensitive data."²⁸ The FTC provided examples of "sensitive data" such as social security numbers, and children's, financial, health and geolocation data.²⁹ Contrary to the FTC's recommendations, the Commission expanded its definition of sensitive data to include the content of communications and "web browsing history, application usage history, and the functional equivalents of either."³⁰ The final broadband privacy rule requires opt-in consent for sensitive data.³¹ The FCC's decision to massively expand the definition of sensitive data essentially makes meaningless the FTC's recommendation to have different opt-in/opt-out requirements based on whether customer data is sensitive.

The Commission also failed to offer any evidence that edge and content providers are respecting consumers' privacy more than broadband providers, or that Internet service providers have any meaningful advantage over content and edge providers with respect to personal data. Given that self-regulation works and the final broadband privacy rule creates regulatory imbalance between the FCC and FTC, the Commission should withdraw the rule and follow the FTC's light-touch privacy approach and encourage the use of voluntary self-regulation.

IV. The FCC privacy rule threatens innovation and the current digital ecosystem

During a hearing in 2017 before the Senate Committee on Commerce, Science and Technology, Gary Shapiro, President and CEO of the Consumer Technology Association, testified that the broadband privacy rule "may establish a dangerous precedent for the entire internet ecosystem."³² Data analytics and digital advertising are the lifeblood of the Internet ecosystem, and a vibrant Internet is critical to emerging technologies such as the Internet of Things and unmanned aircraft. Data analytics and marketing has become such a force in the U.S. economy that it is projected that "digital media in the U.S. will overtake television as the biggest media category [this year]—a year earlier than previously expected—with \$66 billion in revenue."³³ Another study found that data-driven marketing led to a \$202 billion revenue increase to the national economy and created nearly 1 million jobs in 2014.³⁴

²⁸ Comments of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission at 20 (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.

²⁹ *Id.*

³⁰ 81 Fed. Reg. 87274, 87343.

³¹ *Id.* at 87344.

³² Testimony of Gary Shapiro, President and CEO, Consumer Technology Association at 5 (Feb. 1, 2017) available at https://www.commerce.senate.gov/public/_cache/files/b6d4fe57-528c-4f53-9ed2-f75fcee8eaf0/3D88AB0627383A33703F78BE4C1070A9.gary-shapiro-cta-final-testimony-2.1.2017-senate-commerce-committee-hearing-on-regulation.pdf.

³³ Nathalie Tadana, "Digital Ad Spending in U.S. to Surpass Television Spending in 2016," WALL STREET JOURNAL (Oct. 15, 2015) available at <http://www.wsj.com/articles/digital-ad-spending-in-u-s-to-surpass-television-spending-in-2016-1444937398>.

³⁴ 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/>.

The rule also threatens the internet ecosystem because it harms consumers. In fact, polling has indicated that the majority of Americans prefer relevant, targeted advertising that supports “free” content.³⁵ The rule significantly impacts the ability of targeted relevant advertising. Additionally, the rule harms the internet ecosystem because it creates consumer confusion over which agency has jurisdiction over their privacy complaints.

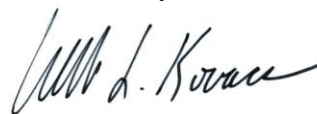
The broadband privacy rule threatens the long-term economic health of broadband and other telecommunications providers. According to Moody’s Investors Services, the FCC’s privacy rules pose “a long-term risk to the current TV advertising business model, as well as all broadband providers whom also have ad sales exposure.”³⁶ Given the regulatory imbalance created by the rule, the credit agency also predicted the rule would be “credit-negative” for Internet service providers.³⁷

V. Conclusion

Broadband investment and usage thrived after the Commission’s 2005 decision to deregulate DSL—all without heavy-handed, complex or prescriptive privacy regulations. Despite a lack of evidence that edge or content providers are respecting consumer privacy any more than broadband providers, the broadband privacy rule threatens the economic health of Internet service providers as well as the rest of the Internet advertising ecosystem by overstepping its statutory authority and furthering the regulatory digital divide between the FTC and the FCC. For the above-mentioned reasons, the Chairman supports the above-referenced petitions for reconsideration. The Commission should abandon the current broadband privacy rule and adopt a light-touch privacy framework similar to that of the FTC.

Thank you for the opportunity to participate in this proceeding. If you have any follow up questions, I may be reached at (202) 463-5457 or by e-mail at wkovacs@uschamber.com.

Sincerely,



William L. Kovacs

³⁵ Grant Gross, “Survey: Internet users like targeted ads, free content,” PCWORLD (Apr. 19, 2013) *available at* <http://www.pcworld.com/article/2035836/survey-internet-users-like-targeted-ads-free-content.html>.

³⁶ 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>.

³⁷ *Id.*