

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5457

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VIA ELECTRONIC FILING

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

**Re: Protecting the Privacy of Customers of Broadband and Other
Telecommunications Services (WC Docket No. 16-106; FCC 16-39)**

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 Proposed Rulemaking (“NPRM”) in the above-referenced proceeding—otherwise known as the proposed broadband privacy rule.

As explained below, the Chamber opposes the proposed 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.

It is troubling that the Commission rejected a request by the Chamber and other industry associations for a longer comment period for the current rulemaking. The Chamber agrees with Commissioner Jessica Rosenworcel who recently stated in Boston, “I do believe that this is the kind of subject that is complicated and would benefit from a longer rulemaking.”¹

The proposed rule will have a significant impact on the American economy across multiple sectors. The NPRM spans 147 pages and contains more than 500 questions for

¹ Mario Trujillo, “FCC Dem agrees with GOP: internet privacy rules would benefit from more time,” THE HILL (May 17, 2016) available at <http://thehill.com/policy/technology/280183-fcc-dem-agrees-with-gop-internet-privacy-rules-would-benefit-from-more-time>.

comment. It proposes to define terms central to the data ecosystem, including “personally identifiable information,” and seeks to create a new data security regime, notwithstanding preexisting and overlapping state and federal laws, jurisdictional and enforcement conflicts with other agencies, repeated instances of legislative and executive forbearance in this area, and ongoing policy debates in Congress.

The current rulemaking would have benefited from an extended rulemaking because a decision about the validity of its legal foundation—the Open Internet Order reclassifying broadband as a public utility under Title II of the Communications Act²—is currently pending in the D.C. Circuit of the United States Court of Appeals.³ Given the multiple outcomes possible in the Circuit Court’s decision, interested parties will not have had adequate time to determine the effect of the court’s ruling on the current complex NPRM.

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

The NPRM questions 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

² See 80 Fed. Reg. 19738 (April 13, 2015).

³ The Chamber filed an *amicus* in opposition to the Open Internet Order. See Brief *Amici Curiae* of the National Association of Manufacturers, The Business Roundtable, and the Chamber of Commerce of the United States of America in Support of Petitioners, *U.S. Telecom Ass’n v. FCC*, No. 15-1063 (Aug. 5, 2015).

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.

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 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 provides consumers with meaningful privacy protections. 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.

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.

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>.

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

Notwithstanding the Chamber's previous assertions that the Commission inappropriately classified broadband providers as Title II common carriers, the current NPRM is also another FCC regulatory overreach. The proposed 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 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, 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 NPRM creates a new category of protected data called "Customer Proprietary Information" ("CPI") which includes both CPNI and "Personally Identifiable Information" ("PII").¹⁸ The NPRM defines PII as "any information that is linked or 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 any data linkable to an individual.

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

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

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. 23408.

¹⁹ *Id.*

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 NPRM furthers a regulatory digital divide

The proposed 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 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 NPRM.

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

²⁰ See 47 U.S.C. §§ 338(i); 551.

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.*

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.

The Commission has 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 current NPRM creates regulatory imbalance between the FCC and FTC, the Commission should withdraw its current proposal and follow the FTC’s light-touch privacy approach and encourage the use of voluntary self-regulation.

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

Prescriptive regulation could threaten a major industry that is vital to the U.S. economy. 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 Everything 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.”²⁸ 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 2014.²⁹

The NPRM threatens the long-term economic health of broadband and other telecommunications providers. According to Moody’s Investors Services, the FCC’s proposed

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.*

²⁸ Nathalie Tadema, “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>.

²⁹ 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/>.

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.”³⁰ Given the regulatory imbalance created by the proposed rule, the credit agency also predicts that NPRM will be “credit-negative” for Internet service providers.³¹

Although voices in the Commission claim that the NPRM does not regulate edge and content providers³², a recent Memorandum of Understanding vaguely states that “no exercise of enforcement authority by the FCC should be taken to be a limitation on authority otherwise available to the FCC, including FCC authority over activities engaged in by common carriers and by *non-common carriers* for an in connection with common carrier services....”³³

Moreover, the Chamber is concerned that the Commission finds authority outside the scope of Title II of the 1934 Communications Act to conduct the current rulemaking. In the NPRM, the Commission asserts “that the rules governing the privacy and security practices of [broadband] providers, such as those discussed in this Notice, would be independently supported by Section 706 [of the 1996 Telecommunications Act].”³⁴ The Commission states that if after an inquiry it determines that broadband is not being deployed in a timely fashion, it has the authority under Section 706 to “take immediate action to accelerate deployment of [broadband] by removing barriers to infrastructure investment....”³⁵ The Commission concludes that increased privacy protections could lead to greater confidence of consumers in their broadband providers which would encourage the deployment of advanced broadband “which further align with the virtuous cycle of Section 706.”³⁶ Under this theory, the Commission is essentially claiming that it has authority, *independent of Title II*, to regulate entities so long as it is doing so in the name of the timely deployment of broadband.

FCC’s interpretation of its statutory authority granted by Section 706 with regard to privacy should give pause to all participants in the data-driven economy because Section 706 as an independent grant would not require regulated entities to be classified as Title II common carriers. The current NPRM establishes a troubling precedent by the Commission that may in the words of one commissioner lead to regulations that “creep towards edge providers.”³⁷

³⁰ 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>.

³¹ *Id.*

³² Statement of Tom Wheeler, Chairman, Federal Communications Commission, Before the Committee on the Judiciary Subcommittee on Privacy, Technology and the Law, *Examining the Proposed FCC Privacy Rules* at 2 (May 11, 2016) available at <https://www.judiciary.senate.gov/imo/media/doc/05-11-16%20Wheeler%20Testimony.pdf>.

³³ FCC-FTC Consumer Protection Memorandum of Understanding at 2 (Nov. 16, 2016) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-336405A1.pdf (emphasis added).

³⁴ 81 Fed. Reg. 23398.

³⁵ *Id.* (citing Pub. L. 104-104 § 706(b)).

³⁶ *Id.*

³⁷ F. Paul Pittman, “FCC Shows Hand on Regulation of Edge Providers,” DATA PRIVACY MONITOR (Sept. 2, 2015) available at <http://www.dataprivacymonitor.com/online-privacy/fcc-shows-hand-on-regulation-of-edge-providers/>.

The Commission should reconsider the proposed privacy rules that will negatively impact the economic health of broadband providers and the digital advertising ecosystem of the Internet as well as the precedent it potentially creates to regulate beyond Internet service providers.

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 current NPRM 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 Commission should abandon its current regulatory approach under the NPRM 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,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is fluid and cursive, with the first name being the most prominent.

William L. Kovacs