

January 26, 2017

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Nancy Pelosi Democratic
Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer Democratic
Leader
U.S. Senate
Washington, DC 20510

Dear Speaker Ryan, Majority Leader McConnell, Leader Pelosi and Leader Schumer:

We urge you to use the authority provided in the Congressional Review Act to rescind the Federal Communications Commission's Broadband Privacy Order.

Congress is fully justified in rescinding these rules both because the Order lacks proper legal grounding and because of the need to ensure real consumer privacy across contexts of user experience.

The FCC's approach is inconsistent with that of the Federal Trade Commission for nearly two decades, and will likely render harm unto consumers.

The FTC focuses on *what* data are held, the level of data sensitivity, and how consumers are affected if the data are misused. This outcomes-based approach takes consumers' preferences into account while preventing actions that harm consumers.

The FTC's approach rests on well-established standards of Unfairness (preventing substantial consumer injury) and Deception (enforcing material promises). Consumers generally agree on what constitutes financial and physical injury. Consumers deem data that could lead to these types of injuries more sensitive, and expect higher security for these data.

The sensitivity of other "private" information is, as the FTC rightly recognizes, often subjective, depending on its use. Some people might choose to post everything about themselves online — details that others might find invasive or embarrassing if made public — while others chose not to join social networks. Some might find value in an application using data about their geolocation in a particular way, while others decline participation because they consider the benefit of the service outweighed by its privacy cost. None of these approaches to privacy is incorrect. Each is a personal decision about tradeoffs. Taking varying consumer preferences into account, the FTC's standards functioned reasonably well, requiring opt-out in most instances and opt-in only for particularly sensitive kinds of data.

The FCC approach focuses on *who* holds the data, rather than *what* — and how sensitive — the data are. This hinders services that consumers want while failing to protect sensitive data across contexts.

The FCC's questionable ability to regulate privacy standards, and its narrow view on what constitutes privacy protection, make its rules counterproductive to actual consumer privacy protections. In contrast, the FTC's approach to privacy does a better job of balancing protection of consumers' privacy online with economic incentives to innovate in consumer products and services.

There are many reasons for Congress to negate these rules: The legality of the Open Internet Order, which these rules are based on, is questionable; the FCC's expanded interpretation of customer proprietary network information from section 222 is incorrect, as it applies specifically to voice services; and sections 201, 202, 303(b), 316 and 705 of the Communications Act also do not give the FCC the authority to enter rules of this nature.

Rescinding the Privacy Order would promote both innovation and effective, consistent privacy protections in over-the-top, application, wireless and wireline markets. It would also send a clear signal that the FCC has lost its way in interpreting the statute Congress gave it. Doing so would not create a gap in privacy protection because the FCC would retain the ability to police privacy practices of broadband companies on a case-by-case basis.

If Congress fails to use the CRA in such a clear-cut case of agency overreach, the statute will fail in its original goal: encouraging regulatory agencies to respect the bounds of Congressional authority.

Sincerely,

Americans for Tax Reform
Digital Liberty
American Commitment
American Consumer Institute
Caesar Rodney Institute
Center for Freedom & Prosperity
Center for Individual Freedom
Competitive Enterprise Institute
FreedomWorks
Frontiers of Freedom
International Center for Law & Economics
Institute for Policy Innovation
The Jeffersonian Project
John Locke Foundation
Less Government
The Main Heritage Policy Center
NetCompetition
Oklahoma Council of Public Affairs
Small Business & Entrepreneurship Council
Taxpayers Protection Alliance
TechFreedom