

January 27, 2017

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mitch McConnell
Senate Majority Leader
U.S. Senate
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Charles Schumer
Minority Leader
U.S. Senate
Washington, D.C. 20515

CC: The 115th Congress

Dear Speaker Ryan, Senator McConnell, Representative Pelosi, and Senator Schumer:

The undersigned media justice, consumer protection, civil liberties, and privacy groups strongly urge you to oppose the use of the Congressional Review Act (CRA) to adopt a Resolution of Disapproval overturning the FCC's broadband privacy order. That order implements the mandates in Section 222 of the 1996 Telecommunications Act, which an overwhelming, bipartisan majority of Congress enacted to protect telecommunications users' privacy. The cable, telecom, wireless, and advertising lobbies request for CRA intervention is just another industry attempt to overturn rules that empower users and give them a say in how their private information may be used.

Not satisfied with trying to appeal the rules of the agency, industry lobbyists have asked Congress to punish internet users by way of restraining the FCC, when all the agency did was implement Congress' own directive in the 1996 Act. This irresponsible, scorched-earth tactic is as harmful as it is hypocritical. If Congress were to take the industry up on its request, a Resolution of Disapproval could exempt internet service providers (ISPs) from any and all privacy rules at the FCC. As you know, a successful CRA on the privacy rules could preclude the FCC from promulgating any "substantially similar" regulations in the future -- in direct conflict with Congress' clear intention in Section 222 that telecommunications carriers protect their customers' privacy. It could also preclude the FCC from addressing any of the other issues in the privacy order like requiring data breach notification and from revisiting these issues as technology continues to evolve in the future. The true consequences of this revoked authority are apparent when considering the ISPs' other efforts to undermine the rules. Without these rules, ISPs could use and disclose customer information at will. The result could be extensive harm caused by breaches or misuse of data.

Broadband ISPs, by virtue of their position as gatekeepers to everything on the internet, have a largely unencumbered view into their customers' online communications. That includes the websites they visit, the videos they watch, and the messages they send. Even when that traffic

is encrypted, ISPs can gather vast troves of valuable information on their users' habits; but researchers have shown that much of the most sensitive information remains unencrypted.¹

The FCC's order simply restores people's control over their personal information and lets them choose the terms on which ISPs can use it, share it, or sell it. Americans are increasingly concerned about their privacy, and in some cases have begun to censor their online activity for fear their personal information may be compromised.² Consumers have repeatedly expressed their desire for more privacy protections and their belief that the government helps ensure those protections are met.³ The FCC's rules give broadband customers confidence that their privacy and choices will be honored, but it does not in any way ban ISPs' ability to market to users who opt-in to receive any such targeted offers.

The ISPs' overreaction to the FCC's broadband privacy rules has been remarkable. Their supposed concerns about the rule are significantly overblown. Some broadband providers and trade associations inaccurately suggest that this rule is a full ban on data use and disclosure by ISPs, and from there complain that it will hamstring ISPs' ability to compete with other large advertising companies and platforms like Google and Facebook. To the contrary, ISPs can and likely will continue to be able to benefit from use and sharing of their customers' data, so long as those customers consent to such uses. The rules merely require the ISPs to obtain that informed consent.

The ISPs and their trade associations already have several petitions for reconsideration of the privacy rules before the FCC. Their petitions argue that the FCC should either adopt a "Federal Trade Commission style" approach to broadband privacy, or that it should retreat from the field and its statutory duty in favor of the Federal Trade Commission itself. All of these suggestions are fatally flawed. Not only is the FCC well positioned to continue in its statutorily mandated role as the privacy watchdog for broadband telecom customers, it is the only agency able to do so. As the 9th Circuit recently decided in a case brought by AT&T, common carriers are entirely exempt from FTC jurisdiction, meaning that presently there is no privacy replacement for broadband customers waiting at the FTC if Congress disapproves the FCC's rules here.

This lays bare the true intent of these industry groups, who also went to the FCC asking for fine-tuning and reconsideration of the rules before they sent their CRA request. These groups now ask Congress to create a vacuum and to give ISPs carte blanche, with no privacy rules or enforcement in place. Without clear rules of the road under Section 222, broadband users will have no certainty about how their private information can be used and no protection against its

¹ Upturn, "What ISPs Can See: Clarifying the Technical Landscape of the Broadband Privacy Debate," at 6-7 (Mar. 2016), available at <https://www.teamupturn.com/reports/2016/what-isps-can-see>.

² Rafi Goldberg, Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities, NTIA (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

³ OTI Reply Comments, FCC WC Docket No. 16-106 (Filed July 7, 2016) at 21-27 (explaining that consumers desire more control over and more protections for their data and how it is collected, used, and shared).

abuse. ISPs could and would use and disclose consumer information at will, leading to extensive harm caused by breaches and by misuse of data properly belonging to consumers.

Congress told the FCC in 1996 to ensure that telecommunications carriers protect the information they collect about their customers. Industry groups now ask Congress to ignore the mandates in the Communications Act, enacted with strong bipartisan support, and overturn the FCC's attempts to implement Congress's word. The CRA is a blunt instrument and it is inappropriate in this instance, where rules clearly benefit internet users notwithstanding ISPs' disagreement with them.

We strongly urge you to oppose any resolution of disapproval that would overturn the FCC's broadband privacy rule.

Sincerely,

Access Now
American Civil Liberties Union
Broadband Alliance of Mendocino County
Center for Democracy and Technology
Center for Digital Democracy
Center for Media Justice
Color of Change
Consumer Action
Consumer Federation of America
Consumer Federation of California
Consumer Watchdog
Consumer's Union
Free Press Action Fund
May First/People Link
National Hispanic Media Coalition
New America's Open Technology Institute
Online Trust Alliance
Privacy Rights Clearing House
Public Knowledge