

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

March 22, 2017

United States Senate
Washington, D.C. 20510

Dear Senator,

Consumers Union, the policy and mobilization arm of Consumer Reports,¹ writes regarding Senate consideration of S.J.Res.34 sponsored by Senator Flake. This resolution, if passed, would use the Congressional Review Act (CRA) to nullify the Federal Communication Commission's (FCC) newly-enacted broadband privacy rules that give consumers better control over their data. We strongly oppose passage of this resolution—it would strip consumers of their privacy rights and, as we explain below, leave them with no protections at all. **We urge you to vote no on S.J.Res.34.**

The FCC made history last October when it adopted consumer-friendly privacy rules that give consumers more control over how their information is collected by internet service providers (ISPs). Said another way, these rules permit consumers to decide when an ISP can collect a treasure trove of consumer information, whether it is a web browsing history or the apps a consumer may have on a smartphone. We believe the rules are simple, reasonable, and straightforward.

ISPs, by virtue of their position as gatekeepers to everything on the internet, enjoy a unique window into consumers' online activities. Data including websites consumers visit, videos viewed, and messages sent is very valuable. Small wonder, then, that ISPs are working so hard to have the FCC's new privacy rules thrown out through use of the Congressional Review Act. But we should make no mistake: abandoning the FCC's new privacy rules is about what benefits big cable companies and not about what is best for consumers.

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over eight million subscribers to its magazine, website, and other publications.

Many argue the FCC should have the same privacy rules as those of the Federal Trade Commission (FTC). FCC Chairman Ajit Pai went so far as to say “jurisdiction over broadband providers’ privacy and data security practices should be returned to the FTC, the nation’s expert agency with respect to these important subjects,”² even though the FTC currently possesses *no* jurisdiction over the vast majority of ISPs thanks to the common carrier exemption³—an exemption made stricter by the Ninth Circuit Court of Appeals in last year’s *AT&T Mobility* case.⁴ We have heard this flawed logic time and time again as one of the principal arguments for getting rid of the FCC’s strong privacy rules. Unfortunately, this is such a poor solution that it amounts to no solution at all.

For the FTC to regain jurisdiction over the privacy practices of ISPs, the FCC would first have to scrap Title II reclassification—not an easy task which would be both time-consuming and subject to judicial review, and jeopardize the legal grounding of the *2015 Open Internet Order*. Congress, in turn, would have to pass legislation to remove the common carrier exemption, thus granting the FTC jurisdiction over those ISPs who are common carriers. We are skeptical Congress would take such an action. Finally, the FTC does not enjoy the same robust rulemaking authority that the FCC does. As a result, consumers would have to wait for something bad to happen before the FTC would step in to remedy a violation of privacy rights. Any fondness for the FTC’s approach to privacy is merely support for dramatically weaker privacy protections favored by most corporations.

There is no question that consumers favor the FCC’s current broadband privacy rules. Consumers Union launched an online petition drive last month in support of the Commission’s strong rules. To date, close to 50,000 consumers have signed the petition and the number is growing. Consumers care about privacy and want the strong privacy protections afforded to them by the FCC. Any removal or watering down of those rules would represent the destruction of simple privacy protections for consumers.

Even worse, if this resolution is passed, using the Congressional Review Act here will prevent the FCC from adopting privacy rules—even weaker ones—to protect consumers in the future. Under the CRA, once a rule is erased, an agency cannot move forward with any “substantially similar” rule unless Congress enacts new legislation specifically authorizing it. Among other impacts, this means a bare majority in the Senate can void a rule, but then

² Statement, Office of Chairman Pai, *FCC Chairman & FTC Chairman on Protecting Americans’ Online Privacy* (March 1, 2017), <https://www.fcc.gov/document/fcc-chairman-ftc-chairman-protecting-americans-online-privacy>

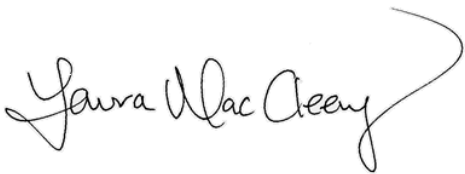
³ Section 5(a)(2) of the Federal Trade Commission Act authorizes the FTC to “prevent persons, partnerships, or corporations, except...common carriers subject to the Acts to regulate commerce...from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” This subsection created the “common carrier exemption” which precludes the FTC from regulating common carriers. The legal definition of a common carrier includes most major telecommunications operators and ISPs.

⁴ *Federal Trade Commission v. AT&T Mobility LLC*, ___ F. Supp. 3d ___ No.15-16585 (9th Cir. 2016)

restoration of that rule is subject to full legislative process, including a filibuster. The CRA is a blunt instrument—and if used in this context, blatantly anti-consumer.

We are more than willing to work with you and your fellow Senators to craft privacy legislation that affords consumer effective and easy-to-understand protections. The FCC made a step in that direction when it adopted the broadband privacy rules last year, and getting rid of them via the Congressional Review Act is a step back, not forward. **Therefore, we encourage you to vote no on S.J.Res.34.**

Respectfully,



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