

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Protecting the Privacy of Customers of Broadband) WC Docket No. 16-106
and Other Telecommunications Services)
)

**COMMENTS OF THE
MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL, BLACKS IN
GOVERNMENT (BIG), CONSUMER POLICY SOLUTIONS, HISPANIC
TECHNOLOGY AND TELECOMMUNICATIONS PARTNERSHIP (HTTP), LGBT
TECHNOLOGY PARTNERSHIP, NATIONAL BLACK CAUCUS OF STATE
LEGISLATORS (NBCSL), NATIONAL COALITION ON BLACK CIVIC
PARTICIPATION, NATIONAL ORGANIZATION OF BLACK COUNTY OFFICIALS,
NATIONAL PUERTO RICAN CHAMBER OF COMMERCE**

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The Multicultural Media, Telecom and Internet Council (“MMTC”), along with eight leading intergovernmental, consumer, business, and social justice organizations, respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced docket.¹ Although we recognize the Commission’s interest in protecting consumer privacy, the NPRM’s construct is complicated and too narrowly focused on a consumer consent regime targeted solely to Information Service Providers (“ISPs”) within the broader Internet ecosystem. The plan is also unprecedented and unwarranted. More specifically, we believe that the FCC’s privacy NPRM will lead to: (1) an increased likelihood of consumer confusion; and (2) unintended impacts on low-income consumers, including elderly low-income consumers. The proposal deviates from the White House’s 2012 Privacy Framework², which established a thoughtful and

¹ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) (“NPRM”).

² *See*, The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (Jan. 2012).

multistakeholder approach to online consumer privacy. In our view, the existing multistakeholder, inter-agency framework for developing consensus on consumer privacy protections and enforcement has been working, and the Commission should not depart from that approach.

I. INTRODUCTION AND SUMMARY

The global telecommunications landscape is in an era of explosive growth, giving rise to the proliferation of high-speed Internet access and increasing consumer demand for greater and cheaper service. Yet, a stubborn digital divide persists that continues to keep certain consumers offline, especially those that are historically disadvantaged. While cost is reported as one of the primary reasons for this adoption gap, consumers also worry about the safety and security of their personal information online. We believe that the NPRM would exacerbate both of these factors to the detriment of consumers generally – and communities of color in particular.

While the Commission may intend to positively address consumer trust issues through the NPRM, its proposed rules risk the opposite. Issues related to online privacy are not new or unfamiliar to experts, advocates, or policymakers. Rather, many hundreds of individuals across state and federal government, industry, academia, and the public interest have been working together to forge a unified path to protect consumers, encourage economic growth, and enhance government efficiency.³ Instead of creating a separate and isolated privacy regime for ISPs, the

³ See The White House, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (Feb. 2012) (“White House Framework”), <https://www.whitehouse.gov/sites/default/files/privacy-final.pdf>; 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>; Family Online Safety Institute, *A Safer Internet for All*, <https://www.fosi.org> (last visited May 26, 2016); FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESS AND POLICYMAKERS (Mar. 2012) (“FTC Privacy Report”), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>; Letter from Jon Leibowitz, Former Chairman,

Commission should be working with the stakeholders who are vested in the outcomes of effective consumer privacy policies. Similarly, the Commission should not impose rules that jeopardize opportunities to narrow the digital divide through innovative business offerings from ISPs, provided consumers are empowered to make informed choices. Finally, by participating in existing and future discussions by multistakeholder groups on privacy, the Commission can best leverage its unique expertise and enforcement authority to the benefit of consumers. The Commission could also work to harmonize its approach with the Federal Trade Commission (“FTC”) to minimize consumer confusion, a concept to be discussed in the next section.

II. THE PROPOSAL WOULD CREATE CONSUMER CONFUSION BY IMPOSING SEPARATE PRIVACY RULES ON BROADBAND INTERNET SERVICE PROVIDERS THAT DIVERGE FROM THE BROADER INTERNET ECOSYSTEM

The NPRM’s proposed rules do not reflect an appreciation of how consumers use the Internet and understand it to function.⁴ Both ISPs and edge providers “depend on the existence of consumers who feel comfortable and secure in the use of their broadband connections.”⁵ The NPRM disregards several efforts now underway to protect consumers online that resist overly prescriptive regulations. Against this background, the Commission should not depart from the groundwork laid by other privacy experts in government and elsewhere.

FTC, to Tom Wheeler, Chairman, FCC *et al.*, WC Docket No. 16-106 (May 23, 2016) (“Chairman Leibowitz Letter”).

⁴ Richard Bennett, *Privacy and the Internet: What the FCC Doesn’t Get*, HighTech Forum (May 17, 2016), <http://hightechforum.org/privacy-internet-fcc-doesnt-get> (last visited May 27, 2016); *See also* Stacey Gray, *Comprehensive Online Tracking is Not Unique to ISPs*, Future of Privacy Forum (May 20, 2016), <https://fpf.org/2016/05/20/14382> (last visited May 27, 2016).

⁵ NPRM, 31 FCC Rcd at 2507 ¶ 11.

A. *EXISTING PRIVACY REGIMES ARE ALREADY PROTECTING CONSUMERS AND BUILDING TRUST ONLINE*

Recognizing the growing importance of the Internet to connect with family, friends, government-citizen interactions, and the economy, the White House,⁶ FTC,⁷ state regulatory agencies, various consumer groups, and industry representatives, have studied this issue for many years, and developed thoughtful proposals. This process has generated a series of reports, conversations, white papers and filings, among other actions demonstrating that solutions for online privacy protections are not “one size fits all.”⁸ In particular, the White House’s 2012 Privacy Framework (“Framework”) recognized the importance of privacy “rules of the road,” sector-specific privacy regimes (where appropriate), and FTC enforcement that sought to provide flexibility for industry to interact with consumers.⁹ Further, the Framework called for use of multistakeholder processes to assess, convene, and deliver strategies for addressing consumer privacy protections.¹⁰ Specifically, the Framework recognized that the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) “has the

⁶ White House Framework at 1-62.

⁷ FTC Privacy Report at 1-112.

⁸ *See, e.g.*, The White House, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES - INTERIM PROGRESS REPORT 1-11 (2015), https://www.whitehouse.gov/sites/default/files/docs/20150204_Big_Data_Seizing_Opportunities_Preserving_Value_s_Memo.pdf; The White House & Council of Economic Advisers, BIG DATA AND DIFFERENTIAL PRICING 1-22 (2015), https://www.whitehouse.gov/sites/default/files/docs/Big_Data_Report_Nonembargo_v2.pdf; The White House, ADMINISTRATION DISCUSSION DRAFT CONSUMER PRIVACY BILL OF RIGHTS ACT 1-24 (2015), <https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf>.

⁹ White House Framework at 2 (observing that the Consumer Privacy Bill of Rights “afford[s] companies discretion in how they implement them” and that “[t]his flexibility will help promote innovation,” and “address the privacy issues that are likely to be most important to their consumers and users”).

¹⁰ *Id.* at 2, 26-27.

necessary authority and expertise ... to convene multistakeholder processes that address consumer data privacy issues.”¹¹

The current processes focus on use cases, not arbitrary regulatory classifications stemming from laws that predate the Internet.¹² These efforts continue to evolve as they reflect consumers’ use and understanding of the Internet – and have established a workable path that consumers generally comprehend. Most important, the FTC goes a step further and places emphasis on the type of personal consumer data collected and how it is used, rather than on the specific business entities that may collect it.¹³

Today’s consumers enter a username and password to post messages to their favorite social media websites, send email, buy goods, watch over-the-top video, and more. In each use case, consumers have an account and reveal potentially sensitive data to a web site or online third parties. As companies collect and use shared data for improving their services, marketing and/or advertising, the existing privacy regimes and those still developing under the 2012 Framework are focused on both consumer interests and expectations. These regimes are also ensuring consumers’ choice to retain or share their personal information over the Internet.

¹¹ *Id.* at 26.

¹² *See, e.g.*, Voluntary Best Practices for UAS Privacy, Transparency, and Accountability (created by the NTIA-convened multistakeholder process concerning privacy, transparency, and accountability issues regarding commercial and private use of Unmanned Aircraft Systems (UAS)), https://www.ntia.doc.gov/files/ntia/publications/voluntary_best_practices_for_uas_privacy_transparency_and_accountability_0.pdf; Short Form Notice Code of Conduct to Promote Transparency in Mobile App Practices, NTIA July 25, 2013 Redline Draft (developed by the NTIA-convened multistakeholder process regarding mobile application transparency), https://www.ntia.doc.gov/files/ntia/publications/july_25_code_draft.pdf.

¹³ *See generally* Chairman Leibowitz Letter (explaining the FTC’s approach to protecting consumer privacy).

B. BECAUSE THE NPRM IS INCONSISTENT WITH EFFORTS ALREADY UNDERWAY TO PROTECT CONSUMER PRIVACY ONLINE, IT WILL LEAD TO CONSUMER CONFUSION

It is for these reasons that Commission’s proposed departure from a comprehensive, multistakeholder approach to consumer privacy is ill advised. Instead, it has proposed rigid and far-reaching rules that are inconsistent with past practice and the practices of other entities that consumers interact with. Those rules, if implemented, will cause consumer confusion and further diminish trust in Internet use. Rather than conform to the direction already set by other agencies, which have more extensive experience with protecting consumer privacy throughout the Internet ecosystem, the NPRM shows little interest in what consumers want and need. It also embraces a top-down approach that layers a three-tiered consent regime with unnecessary disclosure obligations and complicated data security and breach notifications – and all of this for only one set of actors participating in the Internet ecosystem.

In our view, consistency is critical to the effectiveness of the Commission’s efforts to serve its transparency goal, and consumers should not be expected to parse the distinctions the Commission proposes to make. The Commission’s proposed rules would fragment the design of privacy policy across the Internet ecosystem, leaving consumers reliant upon inconsistent sector-specific regulation. In an era and marketplace where privacy policies abound, the Commission should avoid actions that increase variability and contribute to complexity.¹⁴

¹⁴ See FTC Privacy Report at 64 (experts at the FTC concluding that privacy statements should be “clearer, shorter, and more standardized”; we respectfully submit that sector-specific regulation would have the opposite effect); see also *Consumer Online Privacy Survey: Consumer Awareness and Education Important to Protecting Privacy Online* (2009), Consumer Awareness Project, <http://consumerawarenessproject.org/online-privacy-survey> (less than half of consumers read the privacy policies of online stores closely); Aleecia M. McDonald et al., *The Cost of Reading Privacy Policies*, J. of L. & Pol. for the Info. Soc. at 17 (2008) (just skimming privacy policies would take average readers over 150 hours annually).

Moreover, the NPRM appears to rest on the flawed premise that only two types of business entities affect consumer privacy online: ISPs and edge providers.¹⁵ Even if consumers fully understood the difference between the two, the system is far more complicated, with many intermediaries and partners working to ensure that services are delivered efficiently and to the correct consumers.¹⁶ More egregiously, the NPRM incorrectly assigns a hyper-scrutinized position to ISPs vis-à-vis consumers due to ISPs' purportedly unparalleled access to data and high switching costs.¹⁷

III. THE BUSINESS RESTRICTIONS THAT WOULD FLOW FROM THE PROPOSAL WOULD HAMPER BROADBAND ADOPTION

Research indicates that the cost of services is a driving factor in whether consumers adopt broadband at all, as well as the type of broadband service consumers select to use.¹⁸ Therefore, the Commission should refocus its efforts on increasing efforts to accelerate broadband adoption, and educate consumers about the relative strengths and weaknesses of different broadband technologies (*e.g.*, capacity constraints and mobility).¹⁹ This proceeding threatens both goals by

¹⁵ NPRM, 31 FCC Rcd at 2505-2506 ¶ 11. ; *see also* Peter Swire, *Online Privacy and ISPs*, Institute for Information Security & Privacy at Georgia Tech, 79-80 (Feb. 29, 2016) (explaining how mobile operating systems have equal and often better access to consumer data), <http://peterswire.net/wp-content/uploads/Online-Privacy-and-ISPs.pdf>.

¹⁶ *See, e.g.*, Ghostery, FCC Introduction (Apr. 25, 2016) (noting the myriad advertisers, trackers, and relationships among the parties in online) *attached to* Letter from Christopher N. Olsen, Counsel to Ghostery, to Marlene H. Dortch, Sec'y, FCC, WC Docket No 16-106 (Apr. 29, 2016).

¹⁷ NPRM, 31 FCC Rcd at 2502 ¶ 4 (asserting that ISPs “have the ability to capture a breadth of data that an individual streaming video provider, search engine or even ecommerce site simply does not”); *id.* at 2545 ¶ 128 (asserting that consumers face “high switching costs”).

¹⁸ David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda For People Of Color*, at 5 Nov. 21, 2013, <http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf>, *Lifeline and Link Up Reform and Modernization*, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, WC Docket Nos. 11-42, 09-197 & 10-90 (rel. Apr. 27, 2016); John B. Horrigan & Maeve Duggan, *Home Broadband 2015: The Share of Americans with Broadband at Home Has Plateaued, and More Rely on Their Smartphones for Online Access*, Pew Research Center (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/home-broadband-2015>.

¹⁹ *See, e.g.*, Comments of MMTTC *et al.*, MB Docket No. 16-42, CS Docket No. 97-80, at 22 (Apr. 22, 2016) (explaining that the Commission should refocus the considerable agency resources studying and implementing the proposal would require toward other pressing policy needs, such as ensuring that our nation's most vulnerable

restricting innovative products and services that offer flexible pricing options for cost-sensitive consumers.

For example, the FCC should not assume that all alternative payment programs are necessarily wrong or abusive.²⁰ Consumers – especially low-income consumers – could benefit from discounts or other “financial inducements” offered by ISPs, *e.g.*, loyalty programs, and the ease of such billing arrangements. Such inducements serve to significantly drive online usage and, in some cases, ISPs also use inducements and marketing to help financially challenged consumers by offering bundled services and extended payments including on non-communications good and services, such as mobile phone cases or chargers. Contrary to the Commission’s belief, financial inducement programs that require informed consent should not be seen as presumptively coercive, *i.e.*, consumers should have sufficient information provided to understand the benefits of such services and make their choices. Instead, the Commission should provide guidance as to the privacy-protection components that an acceptable program would include. Certain common minimum requirements, such as plain-English disclosures, minimum age for sign-ups, and easy termination should also count in a program’s favor.²¹

communities have broadband connectivity and increasing diverse ownership of our nation’s communications services) (citing *Press Release, FCC, FCC Modernizes Lifeline Program for the Digital Age: New Rules Will Help Make Broadband More Affordable for Low-Income Americans* (Mar. 31, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0404/DOC-338676A1.pdf; see also *Open Internet Order*, 30 FCC Rcd at 5627 ¶ 77 (in part justifying the Commission’s open Internet rules based on the need for closing the digital divide and “facilitating the development of diverse content”); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17687 ¶ 66 n.81 (2011) (explicitly tying the importance of ubiquitous broadband deployment to all Americans to the policies and purposes of the Communications Act “favoring a diversity of media voices”).

²⁰ NPRM, 31 FCC Rcd at 2582-2584 ¶¶ 259-63 (asking about the status of financial inducements and whether the FCC should act to restrain such programs).

²¹ MMTC notes that consumers commonly participate in loyalty programs outside the Internet context, such as those offered by grocery stores and gas stations, to receive lower costs in exchange for information on their purchasing habits. It is not clear why the FCC would wish to ban such programs when offered by ISPs.

IV. ONLINE CONSUMER PRIVACY PROTECTIONS MUST EMBRACE A MULTISTAKEHOLDER APPROACH

To the extent that the Commission believes more efforts are needed to protect consumer privacy, the agency should begin by engaging with NTIA to convene a multistakeholder process to focus on the particular issues associated with consumer uses of broadband networks, and should defer to the FTC's established guidelines and enforcement practices to shape its privacy framework. In its 2012 Framework, the White House correctly identified that multistakeholder processes "enable stakeholders to modify privacy protections in response to rapid changes in technology, consumer expectations, and market conditions."²² The FCC rightfully "recognize[d] the importance of the FTC's expertise and leading on matters of consumer protection" in the recent consumer protection Memorandum of Understanding²³, but then failed to follow its guidance when adopting a privacy framework for ISPs.

A multistakeholder process could focus on practices that would ensure consumers clearly understand who is collecting their data and for what purposes, whether or not the data collectors are ISPs. The FCC could defer to such a multistakeholder group and to the FTC for more flexible, fair and adaptable rules for ISPs. Such deference to the FTC and to consumer stakeholders participating in a multistakeholder process would ensure that all companies are subject to the same "rules of the road," avoiding consumer confusion in the messages consumers receive about how to protect their privacy.

Consumers deserve to have their information managed in an integrated and seamless manner that supports their expectations of privacy and aligns with their use of the Internet. Such

²² White House Framework at 27.

²³ FCC-FTC Consumer Protection Memorandum of Understanding at 1 (2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-336405A1.pdf.

a consumer-centric focus would guarantee better results for the intended beneficiaries of the proposal, instead of devoting the Commission's scarce resources to identifying and policing some, but not all of the alleged "gatekeepers" operating in the Internet ecosystem.

V. CONCLUSION

The proposed broadband ISP privacy rules are overly complicated and outright dismissive of all privacy efforts that have governed online practices before. We believe that the proposed rules are likely to create consumer confusion and unnecessarily eliminate low-cost and consumer-friendly service options that could support greater broadband adoption.

Multistakeholder efforts to date have proved useful in crafting reasonable approaches to consumer privacy protection. Rather than proceed with this rulemaking now, the Commission should build on past efforts by the White House, FTC, NTIA, and other experts and advocates by initiating a new multistakeholder process to consider issues and make consistent and transparent recommendations. It is our view that privacy rules impacting every American require collaboration rather than the singular approach proffered by the FCC.

Respectfully submitted,

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