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October 24, 2016

Chairman Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

I write regarding the FCC's proposed final privacy rules. As you recall, I wrote to you on October 13 requesting that these proposed final rules be published for further notice and comment. While I am waiting for a formal reply to my letter, it is my understanding that you will not be accommodating my request to provide for a deliberative process and that the Commission will instead forge ahead with the vote on a final rule on October 27, 2016. This is unfortunate. Nevertheless, since the Commission will be voting soon on a final rule, I wanted to more fully express my serious concerns with the bare-boned sketch of the order that has been presented to the public so far in your October 6 "fact sheet" and blog post.

As I noted in my prior letter, there are aspects of your new proposal that are encouraging. The FTC's approach to data privacy has worked, so it's good to see the FCC acknowledge that and take steps in that direction. The problem is that the FCC—from what the fact sheet says; again, we won't know for sure until the rules are actually in place—seems to be going significantly beyond the actual FTC approach. I believe this departure from the FTC's privacy regime will create significant legal and policy problems for the Commission. However, most importantly, these final rules are a threat to the continued dynamic development of the Internet.

As I explained at length in comments to the Commission last May, the proposal in the NPRM was riddled with constitutional problems. I believe the Commission's planned position fails all three elements of the *Central Hudson* test, thereby making it an unconstitutional restriction on commercial speech. Under *Central Hudson*, the final question in testing a commercial-speech restriction is whether the action "is no more extensive than necessary to further the State's interest. …" There must be "a fit" between the end and the means. Given the differences between the FCC and the FTC's approach to the sensitivity of data—in particular, the FCC's inclusion of web browsing history as well as app usage history in the category of sensitive data—the FCC's regulations are undoubtedly more restrictive than the FTC's approach. There is insufficient evidence that ISP use of these two additional categories of sensitive data is, or will be, different than those regulated under the FTC's privacy regime. Given the FTC's longstanding, successful, and less restrictive protection of consumer privacy, it's not clear that this new proposed FCC regime passes constitutional muster.

Leaving aside the legal concerns with treating ISP data differently from the data protected by the FTC, it's also bad policy. The inclusion of web browsing and app usage in the FCC's category of sensitive information will result in arbitrary competitive advantages and disadvantages within the space of online advertisement. This only favors established market actors and is bad for both competition and consumers. It's also confusing. Internet users will have different expectations of privacy; when they share information on the edge, it will be FTC rules, while that same information will be under different FCC rules as it travels across their wire or data plans.

In the end, I am concerned that this confusion will result in greater government control of the Internet and the data economy. As a stakeholder noted in a recent letter to the Commission, "a categorical distinction between web browsing information and other information" is "a novel and untested approach [and] would unnecessarily increase regulatory burdens on the Internet." Indeed, I agree with Commissioner Pai in his dissent from the NPRM, when he noted that the "disparate privacy regime" between ISPs and other participants in the Internet ecosystem "is simply a political choice." The contemplated order by the FCC lays the groundwork for future political choices—by it and the FTC—to synchronize privacy regulations across platforms, but to do so according to the more stringent opt-in regime currently contemplated by the FCC. The FCC seems all too ready to impress upon the Internet a "novel and untested approach" regardless of the consequences it will have on the future of the Internet.

It's unfortunate that others and I are left making these arguments in the dark. We can guess what these final rules are going to do by parsing the NPRM in light of a blog post and fact sheet. But reading what we have in the way of tea leaves, the omens are bad. I urge you, at a minimum, not to deviate from the FTC's effective and established approach to consumer privacy as you enact your final order.

Sincerely,

Jeff Flake
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Privacy, Technology & the Law