

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL COMMUNICATIONS COMMISSION

Restoring Internet Freedom

WC Docket No. 17-180

August 30, 2017

---

By notice published on June 2, 2017 the Federal Communications Commission (“FCC”) requested comment on a proposed rule to reclassify broadband internet access service as an information service, classify mobile broadband as a private mobile service, and remove internet from the FCC’s Title II regulation jurisdiction.<sup>1</sup> The FCC also requested comment on who should have jurisdiction over internet privacy, the FCC or the Federal Trade Commission (“FTC”).<sup>2</sup>

EPIC wishes to reiterate that regardless of whether broadband internet remains a telecommunications service or is reclassified as an information service the FCC has a duty to protect internet privacy. This authority comes directly from Congress in Section 222 of the

---

<sup>1</sup> *Request for Comment on “Restoring Internet Freedom,”* 82 Fed. Reg. 25,568 (Jun. 2, 2017) (hereafter “Restoring Internet Freedom”).

<sup>2</sup> Restoring Internet Freedom at ¶50.

Communications Act and from the FCC's ancillary authority.<sup>3</sup> The FCC's proposal to abdicate its responsibility to protect online privacy is contrary to law.

If the FCC believes the FTC should regulate communications companies, it should propose concurrent jurisdiction. The FCC's current proposal does not help consumers. By abdicating responsibility for online privacy, the FCC is allowing consumers to be harmed before any action can be taken against the offending companies. This is unacceptable. The FCC need not be the sole agency protecting online privacy, but they cannot fail to protect privacy

EPIC submits these comments to reply to commenters who addressed the FCC's proposal on internet privacy. Specifically, EPIC wishes to (1) highlight the comments of FTC Commissioner Terrell McSweeney; (2) reiterate that the FTC lacks the ability and the political will to safeguard consumer privacy; 3) urge the FCC to promptly begin rulemaking for new, comprehensive internet privacy rules and; (4) urge the FCC not to allow industry guidelines and self-regulations to take the place of internet privacy rules.

#### **I. FTC Commissioner McSweeney Has Detailed Why The FTC Is Not The Agency Best Equipped To Police Online Privacy**

Several commenter's echoed EPIC's belief that the FCC is the agency that is best suited to handle online privacy including current FTC Commissioner Terrell McSweeney.<sup>4</sup> In her comments, Commissioner McSweeney detailed several of the problems with the FCC's proposal. Commissioner McSweeney noted that the FTC currently does not have clear statutory authority from Congress to carry out the FCC's online privacy proposal<sup>5</sup> and that currently the FTC can

---

<sup>3</sup> 47 U.S.C. §222; *American Library Ass'n v. FCC*, 406 F.3d 689, 700-03 (D.C. Cir. 2005); *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014).

<sup>4</sup> Comment of Terrell McSweeney, Commissioner, Federal Trade Commission, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Jul. 17, 2017 [hereinafter "Commissioner McSweeney Comments"].

<sup>5</sup> Commissioner McSweeney Comments at 7.

only address situations where a harm has already occurred.<sup>6</sup> Additionally, the Commissioner noted that Congress has repeatedly denied the FTC’s request for stronger privacy enforcement tools to assist their staff in the complicated area of internet privacy.<sup>7</sup> Most importantly, Commissioner McSweeney noted that the FCC’s proposal and the FTC’s current enforcement tools are both unfavorable in comparison to the rules the FCC had adopted to protect consumer privacy.<sup>8</sup>

EPIC agrees with Commissioner McSweeney. As we noted in our initial comments the FCC already has a statutorily mandated duty to protect consumer privacy in Section 222 of the Communications Act.<sup>9</sup> EPIC also agrees with the Commissioner that the FTC’s current enforcement mechanisms are not enough to adequately protect consumers. Consumer should not have to suffer a privacy harm or breach of a privacy policy before the government can act.

## **II. The FTC’s Past Internet Privacy Actions Show That Have Failed To Adequately Protect Consumers**

Many commenters appeared to agree with the FCC’s proposal to return jurisdiction over online privacy to the FTC. However, many of these commenters are not privacy experts and have simply assumed that the FTC has the ability and interest to protect consumer privacy.

As noted in EPIC’s initial comments, the FTC has demonstrated that they lack the competence and the political will to protect online privacy.<sup>10</sup> This is detailed in instances where the FTC allowed Google to create comprehensive user profiles,<sup>11</sup> failed to enforce a consent

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Comments of EPIC, *Restoring Internet Freedom*, WC Docket No. 17-108, Jul. 17, 2017 [hereinafter “Initial Comments of EPIC”];

<sup>10</sup> Initial Comments of EPIC at 3-6.

<sup>11</sup> See EPIC, *EPIC v. FTC (Enforcement of the Google Consent Order)*, <https://epic.org/privacy/ftc/google/consent-order.html>.

order with Facebook,<sup>12</sup> and the current lack of response to EPIC's complaint against WhatsApp after the company went back on a promise to the FTC and consumers to honor their original privacy policy.<sup>13</sup> These instances illustrate just a few of the FTC's failures to adequately pursue privacy concerns and ensure that consumer's privacy is protected. Furthermore, allowing companies to engage in practices that can compromise user privacy, exceed the scope of permission to use user data, and failure to enforce their own consent orders sends a message to companies that behavior that consumers may find objectionable will be tolerated. The FTC may have experience in handling internet privacy matters, but they have repeatedly failed to take actions that clearly would benefit consumers.

### **III. The FCC Must Promptly Implement New Internet Privacy Rules**

EPIC also wishes to address those commenters who criticized the FCC's prior privacy rule. The FCC should not have issued a rule that only dealt with half of the internet ecosystem and unfairly excluded websites that collect and retain substantial amounts of data on consumers. It is for this reason that EPIC believes that the FCC must promptly issue new privacy rules that apply to broadband providers and websites alike.

EPIC was disappointed with the FCC's decision not to adopt a comprehensive privacy rule. Many of the commenters who addressed the FCC's uneven-handed approach also noted this fundamental unfairness in the rules that were adopted.<sup>14</sup> Additionally, EPIC agrees with

---

<sup>12</sup>*Facebook, Inc.*, FTC File No. 092 3184 (2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf>. *See also* EPIC, *FTC Facebook Settlement*, <https://epic.org/privacy/ftc/facebook/>.

<sup>13</sup> EPIC & Center for Digital Democracy, *In the Matter of WhatsApp Inc.: Complaint, Request or Investigation, Injunction, and Other Relief*, Aug. 29, 2016, <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf> [hereafter "WhatsApp Complaint"]; *See generally* EPIC *In re* WhatsApp, <https://epic.org/privacy/internet/ftc/whatsapp/>.

<sup>14</sup> *See e.g.* Comments of the Chamber of Comments of the United States of America, *Restoring Internet Freedom*, WC Docket No. 17-108, Jul. 17, 2017; Comments of Verizon, *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, Jul. 17, 2017; Comments of Comcast Corporation, *In the Matter of Restoring Internet Freedom*, WC Docket 17-108, Jul. 17, 2017; Comments of the Staff of the Federal Trade Commission, *In the Matter of*

those commenters who noted the confusing landscape that presented consumers who would have to go to two different agencies based on whether a privacy harm occurred from their service provider or from a website that they visited.<sup>15</sup>

Consumers should have one expert agency to rely on when it comes to issuing rules on internet privacy and addressing harms caused by internet privacy violations and that agency should be the FCC. As has been discussed above, the FCC has been statutorily mandated to protect the privacy of consumers online and can proactively issue privacy rules.<sup>16</sup> The FTC's reactive, notice and choice regime is simply not adequate to protect consumers online privacy. The FCC possesses the most in depth knowledge of the internet and the steps should be taken to ensure that is a more secure environment for consumers.

The Congressional Review Act prevents an agency from adopting a rule that is essentially the same form as the one overturned by Congress.<sup>17</sup> The FCC is therefore not prohibited from issuing new, comprehensive privacy regulations that apply to broadband providers and websites alike. This rulemaking process should begin immediately. Consumers have made it clear that they care about their online privacy and want strong privacy rules in place.<sup>18</sup> Instead of

---

*Restoring Internet Freedom*, WC-Docket 17-108, Jul. 17, 2017; Comments of Cox Communications, Inc., *In the Matter of Restoring Internet Freedom*, WC-Docket 17-108, Jul. 17, 2017 [hereinafter "Comments of Cox"], WC-Docket 17-108, Jul. 17, 2017; Comments of the Free State Foundation, *In the Matter of Restoring Internet Freedom*, WC-Docket 17-108, Jul. 17, 2017; Comments of LGBT Technology Partnership, *In the Matter of Restoring Internet Freedom*, WC-Docket 17-108, Jul. 17, 2017; Comments of NCTA – The Internet & Television Association, *In the Matter of Restoring Internet Freedom*, WC-Docket 17-108, Jul. 17, 2017 [hereinafter "Comments of NCTA"].

<sup>15</sup> *Id.*

<sup>16</sup> 47 U.S.C. §222.

<sup>17</sup> 5 U.S.C. §801.

<sup>18</sup> Raffi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, National Telecommunications & Information Administration, May 13, 2016, <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>; Dan Muro, *New Survey Highlights Startling Erosion of Online Trust*, Forbes, May 15, 2016, <https://www.forbes.com/sites/danmunro/2016/05/15/new-survey-highlights-startling-erosion-of-online-trust/#75281a826eb0>.

abdicated their responsibility to regulate online privacy, the FCC should listen to American consumers and immediately begin the process of issuing new online privacy rules.

**IV. The FCC Should Not Allow For Industry Guidelines Or Self-Regulation To Take The Place Of Privacy Rules**

EPIC wishes to respond to those commenters that proposed that industry self-regulation privacy could occur in the form of voluntary industry principles.<sup>19</sup> EPIC disagrees with these proposals and urges the FCC not to allow industry guidelines or self-regulation to take the place of comprehensive internet privacy rules.

Voluntary industry guidelines would effectively leave consumers in the same, or potential worse, position they are now but with the illusion of adequate privacy safeguards.

**V. Conclusion**

For the foregoing reasons, EPIC urges the FCC to (1) pursue its clear obligations to safeguard Internet privacy; (2) begin a new rulemaking for a comprehensive privacy rule; and (3) pursue concurrent jurisdiction with the FTC.

Respectfully Submitted,

/s/ Marc Rotenberg

Marc Rotenberg  
EPIC President

/s/ Kim Miller

Kim Miller  
EPIC Policy Fellow

---

<sup>19</sup> Comments of Cox at 4; NCTA Comments at 54.