



The FCC Broadband-Privacy Rules and the Congressional Review Act

In October 2016, the Federal Communications Commission passed rules protecting the privacy rights of broadband internet access service customers. These rules are now under threat from the Congressional Review Act (“CRA”), with a resolution sponsored by Sen. Flake that passed the Senate on a party-line vote on March 23. The resolution is now being considered for a vote by the House. At their core, the rules protect people’s right to decide whether or not their ISP can sell or share their personal information, like their web-browsing history.

The rules rightly build on the FCC’s 2015 reclassification of broadband internet access as a telecom service under Title II of the Communications Act. The privacy order implements the mandate in Section 222 of that Act requiring telecom carriers to protect customers’ privacy.

Now, the cable, telecom, wireless, and advertising lobbies are lobbying hard for the CRA to repeal the rules with no replacement, leaving ISPs without any effective oversight of their data security measures and privacy practices. CRA proponents¹ make misleading arguments about the effect and necessity of the rules, the scope of FTC jurisdiction, and the impact of the CRA.

We urge you to oppose the broadband-privacy CRA and protect broadband users’ private information from sharing and sale without their permission.

The FCC’s Privacy Rules Are a Sensible Step to Protect Internet Users.

In 1996, an overwhelming bipartisan majority in Congress wrote and passed sector-specific privacy laws for telecom providers, adding Section 222 to the Communications Act. Congress directed the FCC to promulgate rules and enforce these laws, and the FCC’s broadband-privacy order provides clear rules of the road to do so. It implements the unambiguous directive for telecom carriers to protect customer privacy, and obtain customer permission before using personal information for reasons other than providing network access. The FCC has long been guardian of the United States’ telecommunications network, and its role is just as important in protecting the information of broadband ISP customers as it was for telephone network users.

As gatekeepers to the internet, ISPs have a largely unencumbered view into unencrypted online communications and web browsing history. The harms of not setting clear rules for ISPs are not theoretical. In recent years, ISPs were caught selling customers’ information; hijacking their search queries; injecting “supercookie” trackers into mobile traffic; and inserting invasive ads during web usage.²

¹ See American Advertising Federation *et al.*, Letter to Speaker Ryan, Majority Leader McConnell, Leader Pelosi and Leader Schumer, Jan. 27, 2017: https://consumermediallc.files.wordpress.com/2017/01/congressional-letter-on-cra-resolution-final-722844738_3.pdf.

² See, Jeremy Gillula, Electronic Frontier Foundation, “Five Creepy Things Your ISP Could Do If Congress Repeals the FCC’s Privacy Protections,” March 19, 2017: <https://www.eff.org/deeplinks/2017/03/five-creepy-things-your-isp-could-do-if-congress-repeals-fccs-privacy-protections>.



A CRA Weakens Privacy Without Addressing the FCC Rules' Purported Deficiencies.

The FTC also considers content “sensitive.”

Opponents of the FCC’s privacy rules have complained that it deviates too much from the Federal Trade Commission’s privacy regime, suggesting that the rules must be harmonized or that the FTC should take all oversight of ISPs. Vitiating the FCC’s privacy rules through a CRA resolution will not harmonize these rules. First, the FCC used its rulemaking power to adopt an order broadly similar to the FTC’s sensitivity-based approach to protecting private information. CRA proponents point to the FCC’s inclusion of application usage data and web-browsing history as an overreach. Yet, this past February the FTC fined TV maker VIZIO millions of dollars for tracking customers’ viewing habits without their knowledge and consent.³ The FTC and FCC have both recognized that content choices, like videos viewed and websites visited, are sensitive information deserving informed consent before that information is shared or sold.

Wiping away the rules leaves ISPs unregulated.

A successful CRA resolution prevents agencies from passing rules that are “substantially the same” as the old rules. Prior to this Congress, the CRA had only been used to disapprove of OSHA’s Clinton-era ergonomics rule in 2001. Since then, that agency has not attempted to revisit ergonomics rules, similar or otherwise. The “substantially the same” language of the CRA could hamstring the FCC – preventing the agency from passing any privacy rules absent further congressional action. Courts have not yet fully tested the scope of the CRA’s prohibition. Privacy opponents are all but certain to throw the agency into years of litigation and uncertainty as the matter is resolved. And their sudden support for use of the statutory powers in Section 222 rings hollow, based on the months they spent arguing to the FCC that Section 222 does not even apply to broadband.

A CRA will not bring ISPs back under the FTC’s jurisdiction.

A CRA would repeal the FCC’s privacy rules for broadband and leave no effective replacement. ISPs would be in a regulatory limbo when it comes to their privacy policies. The Federal Trade Commission is barred by statute from examining the practices of common carriers like telephone providers and broadband ISPs. Even a reversal of the FCC’s Title II reclassification decision would not bring all ISPs back under the FTC’s jurisdiction. Last year the 9th circuit sided with AT&T in a case affirming that the FTC’s common carrier exemption applies to entities with the status of common carriers. That means there is no privacy replacement for broadband customers waiting at the FTC if Congress wipes away these rules.

People demand and deserve privacy protections. Vote against the broadband-privacy CRA.

³ See Leslie Fair, the Federal Trade Commission, “What Vizio Was Doing Behind the TV Screen,” Feb. 6, 2017: <https://www.ftc.gov/news-events/blogs/business-blog/2017/02/what-vizio-was-doing-behind-tv-screen>.