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Joint Committee on Telecommunications, Utilities, and Energy
Senator Michael Barrett and Representative Thomas Golden, Jr., Chairs

**SUPPORT FOR H.3698
AN ACT RELATIVE TO INTERNET PRIVACY**

Dear Senator Barrett, Representative Golden, and members of the committee:

Thank you for the opportunity to discuss internet consumer privacy with the committee. Unfortunately, since the inauguration we've already witnessed the undoing of basic consumer privacy rights established by the previous administration. We cannot look to Washington D.C. to fix a problem it is responsible for creating. The burden of restoring these rights therefore falls to the states. It is our hope that legislators on both sides of the aisle in Massachusetts will make it a priority to reinstate these lost privacy rights for Massachusetts consumers.

Background on FCC regulations

As you know, among the Obama administration's last major policy reforms was the implementation of Federal Communications Commission (FCC) regulations establishing basic privacy rules pertaining to internet service providers' use and sale of sensitive customer information (hereafter "FCC regulations"). The regulations aimed to protect internet users' private information much in the same way federal regulations have long protected the privacy of landline phone users.

Just as telecommunications regulations bar AT&T and other telephone service providers from gleaning information about us from our phone calls and monetizing that information, the FCC regulations barred internet service providers, or "ISPs"¹ from using or monetizing sensitive customer information without opt-in consent from the consumer.

In late March 2017, the current Congress used a Newt Gingrich-era law, the Congressional Review Act, to overturn the Obama FCC regulations. On April 3, President Trump signed that measure into law, killing the regulations.

GOP members publicly defended their repeal of the FCC regulations by echoing industry talking points, which argue the rules created an unfair playing field in the digital space. If Google and Facebook aren't subjected to these regulations, they asked, why should Comcast and Verizon be? But that analogy fails. ISPs provide access to the internet; they are not merely a service accessible through it. If the internet's infrastructure is like the roadways we drive on, Google and Facebook are like vehicles. We may feel attached to one method of getting around or another—and some vehicles may be more popular than others—but alternatives exist. By contrast, if we want to participate in the digital economy, apply for school, look for jobs, or communicate with other 21st century denizens, we must access the internet one way or another—and to do so we must pay Comcast, Verizon, or another ISP. For individual privacy, democratic freedoms, and a sustainable and equitable digital future, internet access must be protected

¹ ISPs are also sometimes referred to as broadband internet access services ("BIAS").

² In addition to being based on a faulty and dangerous analogy, the argument that we should eliminate ISP regulations rather than expand consumer privacy protections to account for companies like Google and Facebook charts an ill-

through regulation and law.²

Unfortunately for consumers, the Congressional Review Act contains a provision barring regulatory agencies from ever instituting “substantially similar” regulations if the Act is used to eradicate them. It will therefore be difficult—and may require a change to the Congressional Review Act—for the FCC to institute regulations to protect internet users under a future administration.

For that reason, state legislatures across the country are considering legislation to provide consumers with similar protections under state law.

Key policy requirements for state level internet consumer privacy law

Here in Massachusetts, legislators on both sides of the aisle have already proposed bills to fill the gap left behind when the Trump administration killed the Obama FCC regulations. Among those proposals is Rep. Haddad’s “Act relative to internet privacy,” H.3698, which is a strong step towards regaining what we as a Commonwealth lost when President Trump eliminated the federal privacy regulations.

Among the key elements in H.3698 are:

- Definitions of “opt-in approval” and “sensitive customer proprietary information.” Any legislation that aims to provide Massachusetts residents with FCC regulation-equivalent protections must clearly stipulate what it means to “opt-in” to data collection, and what information is protected by the law. Crucially, H.3698 identifies location information, communications content, web browsing information, and application usage history as “sensitive” and therefore subject to opt-in requirements.
- A ban on the collection, use, and disclosure of customer proprietary information absent the granting of customer opt-in approval, with few exceptions. The exceptions in H.3698 are comprehensive, and allow for the provision of internet service, billing, customer-requested service assistance, and emergencies.
- A requirement that the opt-in process and language be “clear and conspicuous.” In other words, it’s important that ISPs don’t hide the truth about what they want to do with our information in fine, legalistic print that many people will not read or understand. H.3698 stipulates that information about the opt-in process be written and presented in ways that will provide maximum benefit to the public.
- A provision stipulating that the process whereby customers grant, deny, or revoke access to sensitive information be clear, easy to locate, and simple to use. H.3698 requires that ISPs enable customers to engage with their privacy choices via app, website, and a toll free phone number.
- Finally, H.3698 mandates that ISPs must promptly implement any changes to a customer’s privacy choices, and that those choices will remain in effect unless and until the customer decides to alter them. It sensibly forbids ISPs from making any material retroactive change that would result in information being collected, used, or shared in a way the customer did not previously opt-in to.

The ACLU respectfully urges the committee to consider a few additional measures to strengthen H.3698, in order to ensure comprehensive protection for Commonwealth residents.

² In addition to being based on a faulty and dangerous analogy, the argument that we should eliminate ISP regulations rather than expand consumer privacy protections to account for companies like Google and Facebook charts an ill-advised race to the bottom.

- 1) **Privacy and service equality.** To achieve its desired aim, internet consumer privacy legislation must preclude “Pay-for-Privacy” and other incentives for customer opt-ins, and forbid ISPs from providing different qualities of internet service to customers based on their opt-in status. This is essential to prevent companies from undermining the intent of the law. Some companies, including AT&T, have already experimented with Pay-for-Privacy schemes, charging substantially less money to people who allow the company to sell their sensitive information.³ It isn’t fair to grant privacy rights only to those who can afford them. Nor is it acceptable for companies to provide privacy-conscious customers with lesser quality service.
- 2) **Enforcement.** Legislation must include enforcement provisions to make sure consumers or the state Attorney General may hold ISPs accountable if they do not obey the law.
- 3) **A tie to government contracts with ISPs.** In order to avoid potential federal preemption issues, any state legislation regulating internet consumer privacy should tie its privacy provisions to state-funded contracts with ISPs. States have clear legal authority to impose certain conditions and requirements on entities with which the state contracts. In Massachusetts, consumers only have a few options for internet service, and the state government is in the same boat. Applying the bill’s requirements to any ISP that enters into contracts funded in whole or in part with state tax dollars is a simple way to ensure the legislation’s critical protections shield Massachusetts residents from inappropriate surveillance and tracking.

Why regulating internet consumer privacy matters

In his now famous floor speech decrying the vote to kill the FCC regulations, Congressman Mike Capuano asked his Republican colleagues, “What are you thinking?” He couldn’t believe any sensible person would prefer an unregulated internet, through which faceless corporations and data brokers could readily amass incredibly detailed, sensitive profiles of every person in America and use those profiles however they see fit.

Congressman Capuano is right. Unregulated, the ISPs will know you better than your own spouse does—and they will be able to sell or share all the detailed sensitive information it collects about you to other companies, which will be able to use it in ways you’ll never fully understand. Indeed, as artificial intelligence systems become more intelligent and complex, enabling new forms of surveillance, tracking, and data analytics, the stakes for establishing commonsense internet consumer privacy couldn’t be higher. Information collected by ISPs and sold to the highest bidder can be used to swing elections, alter individual lives, manipulate public discourse, and even populate FBI databases. If state legislatures don’t protect internet consumer privacy, people in America will not be able to use the internet without subjecting themselves to increasingly dangerous levels of unregulated corporate surveillance.

We respectfully ask that you strengthen H.3698 as outlined above and give the amended legislation a strong favorable report.

Thank you for your time and attention to this important matter. Please do not hesitate to contact me if you have questions or want more information.

³ Sandra Fulton, “Pay-for-Privacy Schemes Put the Most Vulnerable Americans at Risk,” Free Press, May 10, 2016. Available at <https://www.freepress.net/blog/2016/05/10/pay-privacy-schemes-put-most-vulnerable-americans-risk>.