

March 25, 2019

Michael D. Thibodeau, President of the Senate
Sara Gideon, Speaker of the House
Maine State House
3 State House Station
Augusta, ME 04333

RE: SUPPORT for LD 946 – An Act To Protect the Privacy of Online Customer Information

Dear President Thibodeau and Speaker Gideon:

New America's Open Technology Institute (OTI) supports LD 946 – An Act To Protect the Privacy of Online Customer Information. LD 946 would restore the privacy protections that Maine residents lost after Congress repealed the Federal Communications Commission's (FCC's) broadband privacy rule in 2017. Should LD 946 pass into law, it would assure Maine residents can make unfettered use of the internet without fearing their internet service provider (ISP) could mine and profit from their personal and private data without their permission. OTI urges swift passage of this bill.

For many reasons, consumers need strong privacy protections over how ISPs treat their data. As purveyors of the network and gatekeepers to the internet, ISPs are in a privileged position with nearly-comprehensive access to data about their customers. For their part, consumers must access the internet through an ISP. Thus, to receive internet access service, customers have no choice but to disclose a vast array of data to their ISP, to which they pay a substantial monthly subscription fee for the service. The data ISPs collect and see is highly personal, accurate, and detailed, including web browsing records, geolocation data, financial and health information, and in some cases the content of communications. This universe of data can reveal, for instance, a customer's race or nationality, sexual preference, religion, physical location, presence at home, personal banking details, and physical ailments.

Armed with such comprehensive and revealing data, ISPs can and likely do create intricate profiles of their individual subscribers. Further, they are able to use, sell, or provide access to that data for a variety of purposes, including targeting digital advertisements for products like payday loans or expensive and unnecessary medications. To make matters worse, the ISP market lacks robust competition.¹ Lack of competition means ISP customers in most cases cannot switch providers, as they often can with providers of online services, to avoid an ISP's privacy practices. As such, customers should have the right to choose, through opt-in consent, whether and how their ISPs can use their personal information for purposes other than providing the service.

Recognizing these concerns, the FCC gave consumers the protections they need through its broadband privacy rule in October 2016. After years of debate, the FCC passed a rule that focused on giving consumers choice, transparency, and security over how ISPs use customer data. The crux of the FCC's rule was to require opt-in consent for most uses of data.

The broadband privacy rule was hailed as a victory for consumers, who have long been in favor of stronger privacy protections in general. For instance, a Pew Research Center study found that 91% of adults agree

¹ Restoring Internet Freedom Order, ¶125, Dkt. 17-108 (Jan. 4, 2018), <https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf> (showing nearly 50% of Americans have one or zero options for high-speed internet).

that “consumers have lost control over how personal information is collected and used by companies,” and that 64% of Americans believe government should issue regulations to protect their data from indiscriminate use for digital advertising purposes.² Bain & Company surveyed over 900 U.S. consumers and similarly found that “91 percent of respondents do not want companies selling their data, even if they are compensated for it.”³

Unfortunately, Congress overturned the broadband privacy rule using a rarely-invoked, expedited process under the Congressional Review Act, despite overwhelming bipartisan support from consumers for the broadband privacy rule. A March 2017 poll showed that 80% of Democrats and 75% of Republicans wanted the President to veto Congress’ repeal bill and allow the FCC’s rule to take effect.⁴

At the federal level, authority over ISP privacy practices has moved to the Federal Trade Commission (FTC). The FTC is not the best authority to protect ISP customers’ privacy. First, the FTC is not a telecommunications expert agency. The FCC holds that title. Moreover, the FTC’s authority is limited to policing statements (or material omissions) by ISPs, meaning the FTC allows ISPs essentially to set their own rules. And second, the FTC has little rulemaking authority. Instead, it waits until consumers experience harm before taking action, often many years later, against a limited number of companies. But network operators, including ISPs, have access to extensive, accurate, and very personal data—the harm of using that data in unexpected ways has been known since at least the 1980s when the FCC first implemented telecommunications-specific data requirements (and then again in 1996 when Congress enshrined those protections into law). Thus, it is important for states to step in to ensure proper protection over ISP privacy.

Maine should stand up for its citizens and bring back lost privacy protections. By passing LD 946, which is similar to the FCC’s rule and therefore reflects a broad and robust record composed of a variety of stakeholders, Maine can give its citizens what they have long desired: increased control and choice regarding how ISPs use and disclose the data they collect.

OTI respectfully urges swift passage of this bill.

Sincerely,

Eric Null
Senior Policy Counsel
New America’s Open Technology Institute

² Lee Rainie, *The State of Privacy in Post-Snowden America*, Pew Research Center (Sept. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america>.

³ Press Release, Bain & Co., *How Can Companies Acquire Customer Data While Building Customer Loyalty at the Same Time? Ask Permission*, May 11, 2015, <http://bain.com/about/press/press-releases/Digital-privacy-survey-2015-press-release.aspx>.

⁴ Matthew Yglesias, *Republicans’ Rollback of Broadband Privacy Is Hideously Unpopular*, Vox (Apr. 4, 2017), <https://www.vox.com/policy-and-politics/2017/4/4/15167544/broadband-privacy-poll>; see also *Priorities USA & Civis Survey*, <https://www.scribd.com/document/344203409/PUSA-Civis-ISP-Crosstabs> (finding 83.3% of survey respondents opposed the President signing the bill to repeal the FCC’s privacy rule).