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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6515

August 25, 2016

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Dear Chairman Wheeler:

We write to express concern that the Federal Communications Commission's (FCC or Commission) privacy proposals will result in rules that have a negative economic impact on small Broadband Internet Access Service (BIAS) providers.<sup>1</sup> The extent of this adverse impact, at least in terms of data-driven estimates, is unknown, as the FCC has failed to fully (or adequately) comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA). We urge the FCC to ameliorate this concern and promptly conduct and release for public review an analysis of the impact its proposed privacy rules will have on small businesses.

The RFA requires agencies to describe and assess the economic impacts of their proposals on small entities<sup>2</sup> and regulatory alternatives that mitigate any significant economic impacts. Specifically, the FCC must, when proposing a rule, describe and provide an estimate of the number of affected small entities and the projected reporting, recordkeeping and other compliance requirements of the rule.<sup>3</sup> An agency should provide "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed, or more general descriptive statements if quantification is not practicable or reliable."<sup>4</sup> The RFA also requires the FCC, when adopting a final rule, to publish additional analysis which includes "a description of the steps the agency has taken to minimize the significant economic impact to small entities consistent with the stated objectives of applicable statutes, including . . . legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant

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<sup>1</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, March 31, 2016.

<sup>2</sup> Under the RFA, "small entities" are defined to include small businesses, small not-for-profits, and small governmental jurisdictions. 5 U.S.C. § 601(6).

<sup>3</sup> 5 U.S.C. § 603. The assessment that must be published with the proposed rule is known as the "initial regulatory flexibility analysis."

<sup>4</sup> 5 U.S.C. § 607; *see also id.* at § 602 (requiring the FCC, during October and April each year, to publish in the Federal Register a regulatory flexibility agenda which "summarizes the subject area of any rule the agency expects to propose or promulgate is likely to have a significant economic impact on a substantial number of small entities," along with other disclosures).

alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”<sup>5</sup>

As the United States Small Business Administration’s (SBA) Office of Advocacy pointed out in their Reply Comments in response to the privacy proposals, the FCC’s initial regulatory flexibility analysis is woefully inadequate. It failed to describe or quantify the economic impacts the proposal would have on affected small entities.<sup>6</sup> We are dismayed that the FCC is not complying with the RFA’s requirements.

Small BIAS providers will suffer economic and administrative harm if the FCC continues to ignore its legal obligations under the RFA. The FCC’s proposed privacy rules threaten to impose myriad new compliance burdens, and the Commission’s repeated failure to comply with RFA requirements severely diminishes the ability of small BIAS providers to meaningfully participate in Commission proceedings. While larger entities regularly generate substantial economic studies and research to underscore their advocacy, small carriers simply cannot afford to do this. This is why compliance with the RFA is so critical in these proceedings. Without RFA compliance, small carriers are largely relegated to simply asserting a given regulation will cause them harm. While sincere, assertions can be less persuasive without the weight and credibility that robust economic analysis affords in the broad realm of federal rulemaking. Moreover, if the FCC does not identify the costs and impacts of the rule on entities, it will lack the information it needs to develop significant alternatives that can accomplish the objectives of the rule while minimizing the costs on small business. Most importantly, the FCC must comply with the RFA.

Compliance with the RFA allows small entities that may be disproportionately affected by the proposed rules to provide feedback and suggest exemptions, safe harbors, and other steps that could be taken to both protect consumer privacy and mitigate the economic impact on small BIAS providers. Numerous stakeholders, as well as the SBA Office of Advocacy, have expressed similar concerns in this proceeding.<sup>7</sup> We urge you to promptly fulfill your statutory RFA requirements with respect to the privacy proceeding, and in all proceedings moving forward. Specifically, we ask that you complete and make available to the public a thorough review of the impact that the FCC’s proposed privacy rules would have on small BIAS providers and consider, prior to adoption, alternative ways to mitigate the negative impact the proposed rules will have on small businesses as defined by the SBA including alternative compliance time frames, safe harbors, and a possible exemption.

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<sup>5</sup> 5 U.S.C. § 604. The assessment that must be published with the final rule is known as the “final regulatory flexibility analysis.”

<sup>6</sup> See Reply Comments of the U.S. Small Business Administration’s Office of Advocacy, WC Docket No. 16-106, at 2-3 (filed June 27, 2016) (“SBA Reply Comments”) (stating “[i]n its RFA analysis, the FCC simply describes compliance requirements and seeks comment on compliance costs, without making any attempt to explain what kinds of costs small BIAS providers might incur in order to comply, and without any discussion of how those costs might be disproportionately burdensome for small entities,” and recommending “that the FCC adopt measures to mitigate the disproportionate impact of its proposal on small entities”).

<sup>7</sup> See SBA Reply Comments; see also Reply Comments of Competitive Carriers Association, WC Docket No. 16-106, at 6 (filed July 6, 2016); see also Reply Comments of the Wireless Internet Service Providers Association, WC Docket No. 16-106, at 31-32 (filed July 6, 2016); see also Reply Comments of NTCA-the Rural Broadband Association, WC Docket No. 16-106, at 15 (filed July 6, 2016).

We ask that you provide a written response addressing these concerns by September 8, 2016. Thank you for your attention to this important matter.

Sincerely,



Steve Chabot  
Chairman



Nydia Velázquez  
Ranking Member

Cc: Hon Howard Shelanski  
Office of Information and Regulatory Affairs  
Hon. Ajit Pai  
Commissioner, Federal Communications Commission  
Hon. Jessica Rosenworcel  
Commissioner, Federal Communications Commission  
Hon. Mignon Clyburn  
Commissioner, Federal Communications Commission  
Hon. Michael O'Rielly  
Commissioner, Federal Communications Commission  
Matthew DelNero  
Chief, Wireline Competition Bureau, Federal Communications Commission  
Mike Dabbs  
Director, Federal Communications Commission Legislative Affairs