

National Broadband Plan Calls for Enhanced Privacy and Data Security Protections

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On March 16, 2010, the Federal Communications Commission ("FCC") issued its long-awaited plan, entitled *Connecting America: The National Broadband Plan* ("Broadband Plan" or "Plan"). The Broadband Plan, which runs nearly 350 pages, examines the current state of the broadband "ecosystem" and recommends steps to increase innovation and investment, make additional spectrum available, expand adoption and utilization by all Americans, and promote the use of broadband technology in delivery of health care, education, energy and environment, economic development, government, public safety, and civic engagement. While calling for continued reliance on competitive markets to attain these goals, the Plan also calls for specific legislative or regulatory action to promote the long-term goal of ubiquitous, affordable broadband access by an educated and empowered citizenry.

The Plan identifies personal information privacy and data security as an area in which additional regulation and/or legislative activity is needed, both to preserve a competitive marketplace and to address consumer concerns that may undermine uptake.¹ The danger, according to the Plan, is that increased broadband capacity and Internet usage enables single firms to collect "a vast amount of detailed personal information about individuals, including web searches, sites visited, click-stream, e-mail contacts and content, map searches, geographic location and movements, calendar appointments, mobile phone book, health records, educational records, energy usage, pictures and videos, social networks, locations visited, eating, reading, entertainment preferences, and purchasing history." Broadband Plan at 53. While acknowledging the role that the collection, aggregation, and analysis of this information has played in enabling innovation and providing valuable low- or no-cost services to end-users, the Plan's authors conclude that growing consumer concern about the inability to control digitized personal information poses a threat to consumer adoption that could, in turn, stymie innovation and undermine national priorities. Moreover, existing players that already possess valuable digital profiles about consumers may be able to squeeze out new entrants that do not yet have enough information about consumers "to monetize their 'audience' through advertising." *Id.*

Asserting that the current statutory framework provides "only a partial solution to consumer

concerns and consist[s] of a patchwork of potentially confusing regulations," *id.* at 54, the Broadband Plan calls for specific regulatory and legislative action.

- First, the Plan calls on Congress, the Federal Trade Commission ("FTC"), and the FCC to clarify the relationship between users and their online profiles. Specifically, the Plan proposes that individuals should be given control of the "digital profiles" created by a variety of firms playing different roles in the broadband ecosystem. Enabling consumers to control their digital profiles, and empowering consumers to transfer some or all of the information to third parties, would, in the Plan authors' view, enable new applications and reduce entry barriers. This recommendation—unlike some of the other recommendations relating to privacy—appears to encompass data collection and usage by any participant in the broadband ecosystem, including access, applications, content, and device providers.
 - Citing an FCC study that reflects widespread consumer concern about online privacy and security, the Plan calls for "[c]lear and strong privacy protections that disclose how and when users can delete or manage data shared with [private] companies." *Id.* at 53-54.
 - Noting that a specific individual can be identified with a small amount of data, the Plan concludes that clearer rules are needed to define how and when consumers should be permitted to act anonymously online, and to protect their right to speak anonymously without fear of government reprisal.
- Second, the Plan calls on Congress to enact legislation designed to spur development of trusted "identity providers" to enable consumers to control and manage their digital profiles. Such providers should be subjected to strict guidelines and regular audits to maximize the privacy and security of information entrusted to them by consumers.
- Third, the Plan calls on the FTC and the FCC to work together to develop rules requiring informed consent for disclosure by broadband service providers of more sensitive information such as account and usage information.
- Fourth, the Plan calls on the federal government, led by the FTC, to devote additional resources to combating identity theft.
- Fifth, the Plan calls for coordinated efforts by the FCC, the Department of Homeland Security, the FTC, the White House Cyber Security Office, and other federal agencies to promote consumer online security in support of national security policy.
- And finally, the Plan calls for creation of an interagency working group to coordinate child online safety and literacy work, including by launching a national education and outreach campaign involving government, schools, and caregivers.

No doubt there will be extended debate about various aspects of the National Broadband Plan, including the consumer privacy and security recommendations. The Plan does, however, place the FCC and Congress squarely in the middle of a field that has been, until now, occupied primarily by the FTC. The recommendations may make it more likely that the FTC will call for legislation in its forthcoming report on privacy, due in early summer 2010, and provide fuel to sustain renewed Congressional interest in privacy legislation.

¹ The Broadband Plan discusses consumer privacy and data security in connection with private sector activities. See Broadband Plan at 52-57. However, the Broadband Plan sets out similar recommendations for government actors designed to provide greater transparency about government data collection, empower individuals to access and review personal information held by the government, and enable more efficient delivery of government services. See *id.* at 289-90.